

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

_____)	
In the Matter of)	
)	
Feature Group IP Petition for Forbearance)	WC Docket No. 07-256
Pursuant to 47 U.S.C. § 160(c) from)	
Enforcement of 47 U.S.C. § 251(g), Rule)	
51.701(b)(1), and Rule 69.5.5(b))	
)	
Petition of the Embarq Local Operating)	WC Docket No. 08-8
Companies for Limited Forbearance)	
Under 47 U.S.C. § 160(c) from)	
Enforcement of Rule 69.5(a), 47 U.S.C.)	
§ 251(b), and Commission Orders on the)	
ESP Exemption)	

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February 19, 2008

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Introduction

The Commission has before it two forbearance petitions seeking diametrically opposed results. On the one hand, Feature Group IP asks the Commission to forbear from its access charge rules (among other provisions) to the extent they apply to “IP-PSTN” traffic in order to excuse such traffic from the payment of applicable access charges. On the other hand, Embarq asks the Commission to forbear from the “ESP Exemption” (among other provisions) to the extent it applies to IP-PSTN traffic in order to confirm that access charges apply to such traffic. For the reasons discussed below, AT&T Inc. (“AT&T”) agrees with Embarq that access charges should apply to interexchange IP-PSTN traffic, and we urge the Commission to deny Feature Group IP’s petition, which fails to satisfy any – let alone all – of the three prongs of the forbearance standard under section 10 of the Communications Act.¹

¹ Because AT&T agrees with Embarq to the extent it argues access charges should apply to IP-PSTN traffic, we devote the bulk of these comments to addressing Feature Group IP’s petition.

Background & Summary

More than four years ago, on December 23, 2003, Level 3 filed a forbearance petition with the Commission seeking to excuse “IP-PSTN” traffic from terminating access charges.² Just shy of fifteen months later – after the Commission had developed an abundant record demonstrating that Level 3’s request was contrary to the public interest, and amid widespread media reports that a Commission order denying the petition was imminent³ – Level 3 withdrew its request. Now, four years after the original Level 3 petition was filed, Feature Group IP seeks to resurrect Level 3’s proposal by seeking forbearance from the same statutory and regulatory provisions, for the same purpose: to subsidize IP-based service providers by enabling them to use local exchange switching facilities to originate or terminate interexchange calls on the PSTN, without paying the lawfully tariffed access charges that are assessed on competing providers.

Feature Group IP’s proposal is, if anything, even less persuasive than the Level 3 request that the Commission was poised to deny close to three years ago. First, Feature Group IP is wrong to suggest that forbearance is unnecessary in the first place because IP-PSTN⁴ traffic is

² See Petition, *In re Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (FCC filed Dec. 23, 2003) (“Level 3 Petition”).

³ See, e.g., *Level 3 Withdraws Access Charge Petition*, Washington Internet Daily (Mar. 23, 2005) (“The withdrawal came as word spread . . . that the FCC planned to deny the petition.”); G. Armas, *Level 3 Withdraws Request to FCC Over Internet Phone Fees*, Associated Press State & Local Wire (Mar. 22, 2005) (“Industry officials said the FCC had been preparing to rule against Level 3”); *FCC Expected to Deny Level 3’s Access Charge Petition*, Telecom A.M. (Mar. 22, 2005).

⁴ Consistent with Feature Group IP’s petition (“Petition”), AT&T herein uses the term “IP-PSTN” to collectively describe traffic that originates in IP and terminates on the PSTN as well as traffic that originates on the PSTN and terminates in IP, unless otherwise noted. See Petition at 13 (defining “IP-PSTN” traffic as “[c]ommunications between an IP-based end point and a legacy TDM circuit-switched end point – regardless of which end-point initiated the session”). Feature Group IP has filed two versions of its petition with varying pagination. The version cited herein was attached to an ex parte that Feature Group IP filed October 25, 2007, in WC Docket No. 01-92.

immune from access charges under the ESP Exemption. As AT&T has previously explained,⁵ and as explained again below, Commission precedent indicates that access charges apply when a wholesale provider (such as Feature Group IP) exchanges IP-PSTN traffic with the PSTN. Furthermore, the ESP Exemption was never intended to exempt a provider from paying terminating access charges when it terminates an interexchange call, not to its own databases or other information sources, but to the plain old telephone service (“POTS”) customer of a LEC on the PSTN. Nor was the ESP Exemption ever intended to exempt a provider from paying originating access charges when an ILEC’s POTS customer originates an interexchange call from the PSTN that is delivered to an IXC and then to an enhanced services provider, who terminates the call to its own customer.

Feature Group IP has also failed to meet any of the three statutory criteria for forbearance. The forbearance requested by Feature Group IP would result in unreasonable price discrimination between similarly situated users of LEC access services and would lead to unjust and unreasonable rates for those access services. Beyond that, forbearance would harm consumers, both by jeopardizing the universal availability of affordable telecommunications service and by distorting investment. And forbearance would also contravene the public interest by creating a massive opportunity for regulatory arbitrage that would undermine fair and efficient competition in the communications marketplace. As matter of law, the Commission is thus required to deny Feature Group IP’s petition.

⁵ See Opposition of SBC Communications Inc., *Level 3 Communications LLC Petition for Forbearance*, WC Docket No. 03-266 (FCC filed Mar. 1, 2004); Reply Comments of SBC Communications Inc., *Level 3 Communications LLC Petition for Forbearance*, WC Docket No. 03-266 (FCC filed Mar. 31, 2004); Letter from James C. Smith, SBC, to Chairman Powell, FCC, WC Docket No. 03-266, and attached SBC Memorandum in Opposition to Level 3’s Forbearance Petition (FCC filed Feb. 3, 2005).

To be sure, there is no dispute that the controversies leading to Feature Group IP's proposal – including disputes over the scope of the ESP Exemption, and the differential in some states between intrastate and interstate access rates – merit the Commission's attention. But the solution to those controversies is not a one-sided proposal that would grant one segment of the industry a massive subsidy at the expense of others. Indeed, in its Petition, Feature Group IP is candid about the objective animating its proposal: Feature Group IP “do[es] not want to sell ordinary access, pay ordinary access, or force [its] customers to pay it either.”⁶ But Feature Group IP, like other providers who terminate IP-enabled traffic to LEC customers, *uses* LEC switching facilities for interexchange traffic in precisely the same way as competing providers who pay access charges. Accordingly, unless and until the Commission comprehensively reforms its intercarrier compensation regime, Feature Group IP should also be required to pay the applicable access rates for using those facilities.

Finally, in an effort to distract the Commission's attention from the fatal flaws in its Petition, Feature Group IP fires a series of misguided pot-shots at AT&T regarding an interconnection dispute between the parties in Texas. That dispute is the focus of an ongoing complaint proceeding now pending before the Texas PUC between AT&T Texas and UTEX Communications Corporation (“UTEX”), a Feature Group IP affiliate. In that proceeding, AT&T Texas is seeking to collect millions of dollars in access charges that AT&T Texas has billed pursuant to the terms of the interconnection agreement between the parties, and that UTEX has refused to pay. AT&T Texas' right to those billed charges turns, not on any Commission determination in this docket, but rather on the terms of the parties' interconnection agreement. Indeed, even putting aside the procedural problems with Feature Group IP's petition (discussed

⁶ Petition at 20 n.25.

further below), a decision on that petition would by definition operate only prospectively, and thus could not affect AT&T Texas' right to charges it has already billed pursuant to the parties' agreement. There is thus no reason for the Commission to be distracted by Feature Group IP's AT&T-specific allegations, which in all events are baseless.

Discussion

I. COMMISSION PRECEDENT SUGGESTS THAT ACCESS CHARGES APPLY TO IP-PSTN TRAFFIC

Among the many parallels between the Feature Group IP and Level 3 petitions is their introductory assertion that forbearance is not really necessary because access charges do not apply to traffic that originates in IP and terminates to the PSTN, or vice versa.⁷ That is so, the theory goes, because such traffic is "enhanced" and therefore exempt from access charges under the ESP Exemption. The Commission itself has never squarely addressed this argument, which itself has created significant controversy.⁸ But, as AT&T explained in response to Level 3's petition and reiterates below, the Commission's rules and precedent, coupled with sound policy, require a result in which access charges apply to interexchange IP-PSTN traffic.⁹

⁷ See Petition at 23 ("Feature Group IP contends that [the statute and Commission rules] do not, at present, result in the imposition of interstate or intrastate switched access charges on IP-PSTN or incidental traffic, as defined herein.").

⁸ As AT&T has previously explained, this unaddressed controversy leaves all providers to pursue whatever compensation arrangements for IP-to-PSTN traffic best serve their respective business interests, within the bounds of the law. Comments of AT&T Inc., *Grande Communications, Inc. Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated VoIP Traffic*, WC Docket No. 05-283, at 2, 9-10 (FCC filed Dec. 12, 2005). To the extent the Commission fails to resolve this controversy, it should expect providers to continue behaving in accordance with their business interests.

⁹ As discussed below and in prior filings with the Commission, AT&T believes that the IP-enabled voice services offered by VoIP providers to their end users qualify as information services. See, e.g., Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36, at 33-47 (FCC filed May 24, 2004). That regulatory classification, however, does not impact the access charge liability of those VoIP providers or the wholesale providers who provide them with connectivity to the PSTN. See *infra* pp. 9-10.

The Commission's Access Charge Regime. In 1983, when the Commission first adopted its access charge regime, it determined that *all* providers of interstate service, including then-nascent enhanced services providers, that rely on the local exchange to reach local subscribers should pay their fair share of costs. The Commission thus created “a single, uniform and nondiscriminatory structure for interstate access tariffs covering those services that make identical or similar use of access facilities.”¹⁰ As the Commission later explained, “[o]ur intent was to apply these carrier’s carrier charges to interexchange carriers, and to all resellers and *enhanced service providers*.”¹¹

On reconsideration, however, the Commission carved out an exemption for enhanced services providers, purportedly because permitting LECs immediately to assess interstate access charges – which at the time included significant implicit subsidies to support universal service – would expose those providers to “rate shock,” i.e., “huge increases in their costs of operation which could affect their viability.”¹² The Commission created this “ESP Exemption” by asserting, in paragraph 83 of the *MTS/WATS Recon. Order*, that, for purposes of access charges, LECs should treat enhanced services providers as end users eligible to purchase local business lines out of LECs’ intrastate tariffs, rather than as carriers required to pay LECs’ tariffed switched access rates.¹³ Indeed, it is precisely because LECs *should*, in the normal course, require ESPs to pay access charges for use of exchange access services that the Commission’s

¹⁰ Third Report and Order, *MTS and WATS Market Structure*, 93 F.C.C. 2d 241, ¶ 24 (1982).

¹¹ Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C. 2d 682, ¶ 76 (1983) (“*MTS/WATS Recon. Order*”) (emphasis added).

¹² *Id.* ¶ 83; see also *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1136-37 (D.C. Cir. 1984) (affirming this “graduated transition” to uniform access charges on ground that it was not unreasonable for the Commission to take steps “to preserve [the ESPs’] financial viability, and hence avoid adverse customer impacts”).

¹³ See *MTS/WATS Recon. Order* ¶ 83.

decision in the *MTS/WATS Recon. Order* is commonly referred to as the “ESP Exemption.”

Although the Commission intended the ESP Exemption to be temporary,¹⁴ it has never revoked it, and it therefore remains in place today.¹⁵

Feature Group IP’s Claims Regarding the ESP Exemption. According to Feature Group IP, the ESP Exemption permits it to use LEC local exchange switching facilities without paying access charges on interexchange IP-PSTN traffic.¹⁶ This argument starts from the premise that IP-to-PSTN traffic is an “enhanced service” under the Commission’s rules (now known as an “information service” under the 1996 Act) because IP-to-PSTN traffic purportedly “involve[s] or [is] part of (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct to basic enhanced functionality.”¹⁷ Because Feature Group IP views IP-to-PSTN services to be a type of “enhanced service,” rather than a “telecommunications service,” it believes that IP-to-PSTN traffic does not trigger access-charges under the Commission’s rules.¹⁸

¹⁴ See *id.* ¶¶ 83, 90.

¹⁵ In all events, however, the Commission made clear that, whatever its scope, the ESP Exemption had no effect on the application of *intrastate* access charges on ESPs. Memorandum Opinion and Order, *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, ¶ 318 (1988) (“Under the ESP exemption, ESPs are treated as end users for access charge purposes and therefore are permitted, although not required, to take state access arrangements instead of interstate access. We have not, however, attempted to preempt states from applying intrastate access charges, or any other intrastate charges to ESPs, when such service providers are using jurisdictionally intrastate basic services.”) (footnotes omitted); Memorandum Opinion and Order, *Northwestern Bell Telephone Company*, 2 FCC Rcd 5986, ¶ 17 n.24 (1987) (“[W]e emphasize that in proceedings such as *Computer II* and *Computer III*, we have not attempted to require states to exempt enhanced service providers from intrastate access charges, or any other intrastate charges, when such enhanced service providers are using jurisdictionally intrastate basic services in their enhanced service offerings”), *vacated as moot on other grounds*, Memorandum Opinion and Order, *Northwestern Bell Telephone Company*, 7 FCC Rcd 5644, ¶ 1 (1992) (noting that the enhanced service at issue, “Talking Yellow Pages,” was not introduced into the market).

¹⁶ See Petition at 3, 71.

¹⁷ *Id.* at 3, 54. See also *id.* at 26 (“IP-PSTN communications undergo a ‘net protocol’ conversion, and thus can be classified as ‘Information Services’ under existing FCC precedent.”).

¹⁸ See *id.* at 3.

Based on this interpretation of the ESP Exemption, Feature Group IP and other wholesale providers of IP-to-PSTN services¹⁹ have established connectivity to the PSTN in such a way that enables them to deliver IP-originated interexchange traffic to terminating LECs while avoiding the payment of access charges. These arrangements typically involve an IP-based service provider (*e.g.*, a VoIP services provider) contracting with a wholesale telecommunications service provider (*e.g.*, Feature Group IP or another CLEC) that in turn has negotiated (or arbitrated) an interconnection agreement with the incumbent LEC pursuant to § 252 of the 1996 Act.²⁰ As a general matter, these interconnection agreements authorize the wholesale provider to deliver traffic governed by § 251(b)(5) to the incumbent LEC over interconnection trunks, compensated at reciprocal compensation rates (set pursuant to § 251(b)(5)) that the Commission has made clear apply to traffic *other than* access traffic subject to § 251(g).²¹ Although the IP-

¹⁹ Feature Group IP holds itself out as a provider of wholesale services that facilitate connectivity between IP networks and the PSTN. *See* Petition at 23 n.27. (“all of [Feature Group IP’s] services and all of its traffic are related to a purely and solely interstate tariffed offering designed to facilitate the intercommunication of the Internet and the PSTN.”); Feature Group IP Website at <http://www.featuregroupip.net/> (“FeatureGroup IP is the d/b/a for various regulated, certified CLEC entities (currently UTEX and Premiere Network Services). . . . The business model is principally wholesale in nature, and involves intermediation between the Internet and the Public Switched Telephone Network (‘PSTN’). FeatureGroup IP provides PSTN connectivity to non-carrier Enhanced Service Providers (‘ESPs’) that in turn provide Internet Protocol (‘IP’) enabled enhanced/information services to their customers.”); Verisign Case Study, UTEX Communications Corporation, at <http://www.verisign.com/static/040845.pdf> (“Feature Group IP deals exclusively in the wholesale intermediation of new technology-based voice over Internet protocol (VoIP) traffic with legacy time-division multiplexing (TDM) traffic. . . . Lowell Feldman, Feature Group IP’s chief executive officer, described the company’s services, ‘We sell to people who in turn usually sell to consumers or create retail packaged products. We’re behind the scenes creating switching technology and the underlying specifications for policy and routing to enable leading-edge communications systems to interface with traditional ones.’”).

²⁰ In addition, some IP-based providers purchase their connectivity directly from the terminating incumbent LEC in the form of local business lines (*e.g.*, primary rate interface lines or PRIs) connected to the incumbent LEC’s end offices. Although the arguments herein would apply to IP-to-PSTN traffic terminated over any such connections, nothing in these comments is intended to suggest that VoIP providers may not purchase local business lines from the wholesale providers (*e.g.*, CLECs) that deliver the VoIP providers’ IP-originated traffic to a terminating LEC on the PSTN.

²¹ *See* 47 C.F.R. § 51.701(b)(1).

to-PSTN traffic at issue here is interexchange traffic, the wholesale provider nevertheless delivers it to the incumbent LEC over interconnection trunks without payment of access charges on the rationale that, under the ESP Exemption, the IP-based provider (or its wholesale partner) that hands the wholesale provider the traffic is properly considered, not an interexchange carrier, but rather an “end user” that is exempt from access charges.

FCC Precedent Indicates that Access Charges Apply to IP-to-PSTN Traffic. Although, as noted, the Commission has never spoken precisely to the issue, AT&T and other LECs have argued that the claims made by Feature Group IP and similar wholesale providers are flawed. First, regardless of the statutory classification of end-to-end IP-to-PSTN services, the text of rule 69.5(b) supports the application of terminating access charges to interexchange IP-to-PSTN traffic, particularly where that traffic is delivered to the PSTN by a wholesale provider.²² Indeed, the March 2007 *Wholesale Telecommunications Service Order* makes clear that such wholesale providers (including Feature Group IP)²³ are “telecommunications carriers” under the Act and the wholesale interconnection service they provide – “for the purpose of transmitting traffic” originated by an IP-based provider “to or from another service provider” – is a “telecommunications service.”²⁴

That is so, moreover, irrespective of the statutory classification of the IP-based service provided to the originating end user (i.e., “telecommunications service” or “information service”). As the Bureau explained, the “statutory classification of a third-party provider’s VoIP

²² See 47 C.F.R. § 69.5(b) (“[C]arrier charges shall be . . . assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate . . . telecommunications services.”).

²³ See *supra* n.19 (discussing Feature Group IP’s status as a wholesale provider).

²⁴ Memorandum Opinion and Order, *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513, ¶¶ 1, 11, 16 (2007) (“*Wholesale Telecommunications Service Order*”) (emphasis added).

service” as a telecommunications service or an information service simply “*has no bearing on*” and is “*irrelevant*” to this analysis.²⁵ Thus, regardless of the classification of that IP-based service, the wholesale provider that delivers the IP-originated traffic to the PSTN is providing a “telecommunications service” to the IP-based service provider.²⁶ Indeed, if that were not the case, the wholesale provider (*e.g.*, Feature Group IP) would not be able to rely on the *Wholesale Telecommunications Service Order* to assert any interconnection rights under section 251 of the Act, because that order is “limited to wholesale carriers that are acting as telecommunications carrier[s] for purposes of their interconnection request.”²⁷

Thus, to the extent wholesale providers like Feature Group IP are using LEC local exchange switching facilities to provide a wholesale telecommunications service to IP-based providers in order to deliver IP-originated traffic to called parties on the PSTN, the Commission’s own precedent indicates that they are using those facilities, in the words of rule 69.5(b), “for the provision” of a “telecommunications service.”

Nor, in AT&T’s view, is it the case that the ESP Exemption should excuse wholesale service providers like Feature Group IP from paying access charges on IP-to-PSTN traffic as contemplated in section 69.5(b) of the Commission’s rules. As discussed above, the exemption

²⁵ *Id.* ¶ 15 (emphases added).

²⁶ *Id.* See Petition for Declaratory Ruling, *Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, at 4 (FCC filed Mar. 1, 2006) (“Time Warner Cable has arranged to purchase wholesale telecommunications services from Sprint . . . [and] MCI . . . , thereby permitting Time Warner Cable, where necessary, to receive calls from and deliver calls to subscribers connected to the PSTN.”); Sprint Nextel Comments, *Petition of Time Warner Cable for Declaratory Ruling*, WC Docket No.06-55, at 24 (FCC filed Apr. 10, 2006) (“In providing their services to cable telephony and VoIP providers, wholesale carriers like Sprint Nextel clearly act as telecommunications carriers.”); *see also id.* at 13-20 (explaining that the wholesale services Sprint Nextel offers to VoIP providers are “telecommunications services”).

²⁷ *Wholesale Telecommunications Service Order* ¶ 16.

was crafted to enable enhanced service providers to purchase local business lines in order to communicate *with their own customers*; it was never intended, as wholesale providers are using it today, to enable service providers to deliver traffic *to customers of other carriers*, without payment of the access charges that apply to that traffic. As the Commission has explained, from the beginning, the rationale of the exemption was that LECs should not treat ESPs comparably to interexchange carriers – and subject them to access charges – “solely because [they] use incumbent LEC networks to receive calls from their customers.”²⁸ “It is not clear,” the Commission elaborated, “that [ESPs] use the public switched network in a manner analogous to IXCs.”²⁹ Rather, ESPs, many of whom offered database access services to their customers, were viewed by the Commission as akin to business users. As the Commission explained, “many of the characteristics of the [ESP] traffic (such as large numbers of incoming calls to Internet service providers) may be shared by other classes of business customers.”³⁰ Thus, “[a]lthough the LEC services or facilities used by the [ESPs] may be similar to those used by some companies that pay per-minute access charges, the [ESPs] do not use them in the same way or for the same purposes. . . . [T]he [ESP’s] use of the LEC facilities is analogous to the way another business subscriber uses a similarly-priced local business line to receive calls from customers who want to buy that subscriber’s wares that are stored in another state and require shipment back to the customer’s location.”³¹ Thus, the ESP Exemption applies where the LEC’s

²⁸ First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982, ¶ 343 (1997) (“*Access Charge Reform Order*”), *petitions for review denied*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

²⁹ *Id.* ¶ 345.

³⁰ *Id.*

³¹ Brief for the FCC, No. 97-2618, at 75-76 (Dec. 16, 1997), filed in *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (“*FCC Brief*”). In upholding the ESP Exemption, the Eighth Circuit endorsed the Commission’s explanation that the exemption excuses ESPs from access charges only

exchange access services are being used to provide the link *between* the ESP and its subscriber, for the provision of an information service by the ESP to *its own subscriber*.

The IP-to-PSTN traffic at issue in Feature Group IP's petition is nothing like the traffic the Commission intended to exclude from access charges. As explained at the outset, this traffic is purportedly originated in IP by the customer of the IP-enabled service provider, and it relies on the PSTN only for delivery to the *called party* who is not a customer of the IP-enabled service provider. But the ESP Exemption does not, and was never intended to, exempt an ESP from paying terminating access charges when it picks up an IP-based call from its own customer and relies on a wholesale provider to terminate that call to the *POTS customer of a LEC on the PSTN* who does *not* receive an information service. In that circumstance, the LEC's local exchange facilities are not being used by the ESP like any other business customer, i.e., "in order to receive local calls from customers who want to buy . . . information services," but instead in a manner precisely "analogous to IXC's"³² who use local exchange switching facilities for the provision of telecommunications services.

Moreover, even if Commission precedent suggested that the ESP Exemption does apply, as a general matter, to IP-to-PSTN traffic, it would operate to permit a provider of IP-to-PSTN services to purchase a local business line (*e.g.*, a PRI) from the terminating LEC for the purpose of delivering interexchange traffic to the PSTN. Indeed, from its inception, the ESP Exemption has been described by the Commission as a mechanism "pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN

insofar as they "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges." *Southwestern Bell*, 153 F.3d at 542; *see also id.* 544 ("Here, the FCC is exempting from interstate access charges [ESPs] that, according to the FCC, utilize the local networks differently than do IXCs.").

³² FCC Brief at 75-76; *see also Access Charge Reform Order* ¶ 345.

through intrastate local business tariffs rather than through interstate access tariffs.”³³ But in the circumstances at issue here, the ESP is *not* purchasing its connection to the PSTN from the terminating LEC’s intrastate local business tariff. Instead, a wholesale provider (not the ESP) is purchasing an interconnection trunk (not a local business line) from the terminating LEC pursuant to an interconnection agreement (not an intrastate tariff). Thus, regardless of whether the ESP Exemption permits an ESP to purchase a local business line as a means to deliver interexchange IP-to-PSTN traffic to the PSTN without payment of access charges, the Commission has *never* suggested that the exemption enables a wholesale provider (*e.g.*, a CLEC) to be treated as an “end user” and permits that wholesale provider to purchase an interconnection trunk out of an interconnection agreement in order to terminate interexchange IP-to-PSTN traffic on the PSTN while avoiding access charges.

In sum, contrary to Feature Group IP’s assertion, Commission precedent indicates that the ESP Exemption does not exempt IP-PSTN traffic from access charges in the two scenarios Feature Group IP describes: (1) when a non-ISP subscriber picks up his or her standard telephone and makes a regular interexchange phone call to reach the called party (who happens to be using an IP-based platform), and, at some point along the way, that call is handed off by the calling party’s carrier to a wholesale provider for ultimate termination to an IP-based platform; and (2) when a subscriber of IP-enabled service initiates an IP-originated interexchange call that the IP-enabled service provider hands to Feature Group IP (or another CLEC), which in turn delivers that call to the PSTN, to be terminated over the circuit-switched network to a LEC end user. In both scenarios, on the LEC side of the call, the PSTN is being used *not* so that *the ISP’s*

³³ Declaratory Ruling and Notice of Proposed Rulemaking, *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, ¶ 23 (1999), *vacated and remanded on other grounds*, *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

subscriber may access an *information service*, but so that a *non-ISP* subscriber – i.e., the LEC subscriber – can place or receive a telephone call. In both circumstances, moreover, the LEC’s local exchange facilities are being used in the same manner as when they are used to originate or terminate a conventional, wireline interexchange call. As a matter of law and sound policy, it follows that, in both circumstances, access charges should apply just as they do in the origination and termination of conventional interexchange calls.³⁴

II. FEATURE GROUP IP’S PETITION FAILS TO MEET THE REQUIREMENTS OF SECTION 10

Section 10 of the 1996 Act provides that the Commission “shall forbear from applying any regulation or any provision of [the Communications Act] to a telecommunications carrier or telecommunications service,” if it determines that: (1) “enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory”; (2) “enforcement of such regulation or provision is not necessary for the protection of consumers”; and (3) “forbearance from applying such provision or regulation is consistent with the public interest.”³⁵ In assessing whether the requested relief is in the public interest, “the Commission shall consider whether

³⁴ Feature Group IP cites a bankruptcy court decision that, it claims, supports its position that a carrier that routes traffic using IP may invoke the ESP Exemption. See Petition at 54 n.72 (citing *In re Transcom Enhanced Servs., LLC*, 2005 Bankr. LEXIS 1244 (Bankr. N.D. Tex. Apr. 28, 2005). Feature Group IP neglects to note that the decision on which it relies was vacated on appeal. See Memorandum Order, *AT&T Corp. v. Transcom Enhanced Services, LLC*, Civ. No. 3: 05-CV-1209-B (N.D. Tex. Jan. 20, 2006). The subsequent decision by the same bankruptcy court (*In re Transcom Enhanced Servs., LLC*, Case NO. 05-31929-HDH-11 (Bankr. N.D. Tex. Sept. 20, 2007)) relied upon by Feature Group IP is equally irrelevant. That decision was an interlocutory ruling in an adversarial proceeding that did not involve a terminating LEC, and in which the meaning and scope of the ESP Exemption was not in dispute. Moreover, the parties to that proceeding subsequently settled their dispute, which by operation of law mooted the interlocutory ruling on which Feature Group IP relies.

³⁵ 47 U.S.C. § 160(a).

forbearance . . . will promote competitive market conditions.”³⁶ As the D.C. Circuit has explained, the three prongs of the forbearance test are conjunctive – they “must all be satisfied” before the Commission may forbear from enforcing a regulation or statutory provision.³⁷ For the reasons explained below, Feature Group IP fails to meet any of the three prongs for forbearance, let alone all of them, and its petition must therefore be denied.

A. The Forbearance Feature Group IP Seeks Would Result in Discriminatory Charges, Practices and Classifications for Exchange Access Services

The relief Feature Group IP seeks – the ability to exchange IP-PSTN traffic without the payment of the access charges that apply to all other interexchange traffic – would not result in “charges, practices, . . . or classifications” in connection with exchange access services that “are just and reasonable and are not unjustly or unreasonably discriminatory.”³⁸ Quite the contrary: Providers of IP-PSTN calls use a LEC’s circuit-switched facilities to complete the PSTN portion of an interexchange call in the same fashion as providers of traditional long-distance calls. Exempting providers of IP-PSTN calls from the access charges applicable to these facilities would affirmatively skew competition in favor of these providers and against traditional long-distance providers because providers of IP-PSTN calls would gain a significant cost advantage over their non-IP competitors – not as a result of superior technology or better service quality – but purely because of a regulatory decision to exempt them from access charges.

Feature Group IP attempts to portray this fatal defect as a virtue. It claims that forbearance in fact meets the requirements of Section 10(a)(1) because the relief it seeks would enable it, and presumably other similarly-situated carriers, to exchange IP-originated traffic with

³⁶ *Id.* § 160(b).

³⁷ *Cellular Telecomms. and Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

³⁸ 47 U.S.C. § 160(a)(1).

the PSTN without paying access charges.³⁹ But this pro-arbitrage advocacy gets things exactly backwards. The Commission has long recognized that the “cost of the PSTN should be borne equitably among those that use it in similar ways.”⁴⁰ In the context of access charges, this means that “*any* service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”⁴¹ Indeed, “[o]ne of the Commission’s primary objectives with respect to the formulation of [its] access charge rules has been to assess access charges on all users of exchange access, irrespective of their designation as carriers, non-carrier service providers, or private customers.”⁴² Feature Group IP’s proposal – which, for no legitimate reason, would grant IP-based providers a discriminatory exemption from the access charges that apply to comparable carriers providing competing services – is out-of-step with that core objective.

Moreover, Feature Group IP ignores the fact that, as a result of the Commission’s access-charge reform efforts, LEC charges for interstate exchange access services – i.e., the charges that Feature Group IP wishes to avoid through forbearance – are *already* “just and reasonable and . . . not unjustly or unreasonably discriminatory.” With respect to price-cap LECs, for example, the Commission has found that the current interstate access charge rate structure – including the level of per-minute terminating access charge rates for price-cap LECs – “reflect[s] the manner

³⁹ See Petition at 20.

⁴⁰ Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4683, ¶ 61 (2004).

⁴¹ *Id.*

⁴² Report and Order and Order on Further Reconsideration and Supplemental NPRM, *Amendments of Part 69 of the Commission’s Rules Relating To the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 4524, ¶ 54 (1991).

in which carriers incur costs.”⁴³ The “implicit subsidies” that were once reflected in above-cost per-minute access rates have in most instances been “eliminate[d],”⁴⁴ and the Commission has expressly found that the resulting rates are “just and reasonable.”⁴⁵

Feature Group IP asserts, however, that, if its petition is granted, exchange of IP-to-PSTN and PSTN-to-IP traffic will be “governed by Section 251(b)(5),” which itself “will ensure that charges and practices are just, reasonable and nondiscriminatory.”⁴⁶ The Commission, however, has already rejected Feature Group IP’s contention that, if forbearance from section 251(g) were granted, exchange access traffic would be automatically governed by section 251(b)(5). In particular, in the *Core 251-254 Forbearance Order* – which rejected a similar request for forbearance from section 251(g) – the Commission stated that “[s]ection 251(g) preserves pre-Act compensation obligations and restrictions for ‘exchange access, information access, and exchange services for such access . . . until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.’”⁴⁷ Forbearance reflects a determination by the Commission to *cease enforcing* an existing regulation or statutory provision; it does not constitute a “regulation[] prescribed by the Commission.” As a result, the Commission explained, even if the Commission were to forbear from section 251(g), “the

⁴³ Sixth Report and Order in CC Docket Nos. 92-262 and 94-1, and Report and Order in CC Docket No. 99-249, and Eleventh Report and Order in CC Docket No. 96-45, *Deployment of Access Charge Reform*, 15 FCC Rcd 12962, ¶ 129 (2000) (subsequent history omitted) (“*CALLS Order*”).

⁴⁴ *See id.* ¶ 29; *see also id.* ¶ 36 (“The CALLS Proposal is a reasonable approach for moving toward the Commission’s goals of using competition to bring about cost-based rates, and removing implicit subsidies without jeopardizing universal service.”).

⁴⁵ *See id.* ¶ 176.

⁴⁶ Petition at 57; *see id.* at 67-68.

⁴⁷ Memorandum Opinion and Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 22 FCC Rcd 14118, ¶ 14 (2007) (“*Core 251/254 Forbearance Order*”) (quoting 47 U.S.C. § 251(g)) (emphasis in original).

section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g).”⁴⁸

Feature Group IP seeks to remedy this defect in its petition by also requesting forbearance from a single clause in Commission Rule 51.701(b) that expressly excludes exchange access traffic from the scope of section 251(b)(5) reciprocal compensation obligations.⁴⁹ But, even assuming *arguendo* that a carrier can effectively rewrite Commission regulations by seeking forbearance from individual clauses of Commission rules, this request does not avoid the Commission’s holding in the *Core 251/254 Forbearance Order*. The Commission there explained that section 251(g) traffic would come within the scope of section 251(b)(5) only as a result of “affirmative Commission action” – i.e., via “regulations prescribed by the Commission.”⁵⁰ By definition, forbearance (the act of ceasing enforcement of existing regulation) does not constitute a “regulation[] prescribed by the Commission.”

Even apart from the Commission’s holding in the *Core 251/254 Forbearance Order*, moreover, Feature Group IP is wrong to contend that reciprocal compensation arrangements under section 251(b)(5), as applied to the origination and termination of interexchange traffic, would result in just and reasonable rates for the use of LEC local exchange facilities. In the *CALLS Order* – in connection with its determination that LEC exchange access rates are just and reasonable – the Commission found no merit in the argument that those rates should be necessarily reduced to section 251(b)(5) levels, particularly in the absence of a more comprehensive proceeding to address the implications of such a significant restructuring in the

⁴⁸ *Id.*

⁴⁹ See 47 C.F.R. § 51.701(b)(1) (excluding from the definition of “[T]elecommunications traffic” subject to section 251(b)(5) “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access”); see Petition at 30.

⁵⁰ *Core 251/254 Forbearance Order* ¶ 14 (quoting 47 U.S.C. § 251(g)).

manner in which LECs recover their costs.⁵¹ The Commission explained that, “as a legal matter,” the transport and termination of local traffic covered by section 251(b)(5) “are different services than access service” and therefore are “regulated differently.”⁵² The Commission further concluded that the target exchange access rates it adopted were a “reasonable transitional estimate of rates that might be set through competition,”⁵³ and, again, concluded that the target rates were “just and reasonable.”⁵⁴

Finally, Feature Group IP suggests that the difficulty of ascertaining the end points of IP-enabled traffic supports a decision that would exempt such traffic from access charges, and would subject it to section 251(b)(5) instead.⁵⁵ But, even apart from the legal impediments to that result discussed above, Feature Group IP’s argument is a *non sequitur*. The difficulty of determining the end points of IP-enabled traffic supports the Commission’s objective of a unified rate structure, which AT&T and much of the industry supports. Indeed, the Missoula Plan is based in large part on that very premise and is designed to facilitate that objective.⁵⁶ Feature Group IP’s proposal, by contrast, would be a step in the opposite direction. It would give preferential treatment to a particular class of service providers that use the PSTN in the same way as other access customers who are required to pay access charges under the Commission’s long standing rules. Accordingly, the Commission cannot rationally conclude that such relief would result in “charges, practices, . . . or classifications” in connection with exchange access

⁵¹ *CALLS Order* ¶ 178.

⁵² *Id.*

⁵³ *Id.* ¶¶ 176, 178.

⁵⁴ *Id.* ¶ 176.

⁵⁵ *See* Petition at 71-72.

⁵⁶ *See* Public Notice, *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, 21 FCC Rcd 8524 (2006) (“The Missoula Plan is the product of a 3-year process of industry negotiations led by NARUC. Supporters of the plan include AT&T, BellSouth Corp., Cingular Wireless, Global Crossing, Level 3 Communications, and 336 members of the Rural Alliance, among others.”).

services that “are just and reasonable and are not unjustly or unreasonably discriminatory,” as required by section 10(a)(1).⁵⁷

B. Feature Group IP’s Proposal Would Harm Consumers

Nor can Feature Group IP establish that its forbearance proposal would advance the interests of consumers, as required by Section 10(a)(2).⁵⁸ To the contrary, the relief Feature Group IP seeks would work to the detriment of consumers, for at least two reasons.

First, by seeking a broad access-charge exemption without any corresponding reforms to support universal service, Feature Group IP’s proposal threatens the statutory objective of “preserv[ing] and advanc[ing] universal service.”⁵⁹ In the dozen years since enactment of the 1996 Act, the Commission has consistently recognized that access-charge reform cannot occur in a vacuum. Historically, per-minute usage-based switched access charges were set to recover both traffic-sensitive costs – i.e., costs that vary with usage – and non-traffic sensitive costs, attributable primarily to “the local loop that connects an end user” to the network.⁶⁰ Although this rate structure distorted competition, its main purpose was clear: to “reduce charges for connection to the network,” thereby making basic telephone service more affordable.⁶¹ Importantly, as the Commission emphasized, that rate structure could not be rationalized, and switched access-charges could not be reduced, without corresponding adjustments elsewhere. Indeed, the regulation of LEC cost recovery has been analogized to a three-legged stool – consisting of end user rates, access charges, and universal service – and policymakers have

⁵⁷ 47 U.S.C. § 160(a)(1).

⁵⁸ *See id.* § 160(a)(2).

⁵⁹ *E.g., Id.* § 254(b).

⁶⁰ *Access Charge Reform Order*, ¶ 28; *see also* Seventh Report & Order and Thirteenth Order on Reconsideration, *Federal-State Joint Board on Universal Service; Access Charge Reform*, 14 FCC Rcd 8078, ¶ 46 (1999) (discussing states’ historical implicit universal support mechanisms).

⁶¹ *Access Charge Reform Order*, ¶ 28.

consistently recognized that modifications to one leg of that stool cannot be made in isolation, but rather must be balanced by corresponding adjustments to the other legs.⁶²

And that is precisely what the Commission accomplished in the *CALLS Order*, which in large part “remov[ed] implicit subsidies from the interstate access charge system,”⁶³ while at the same time permitting increases in end-user subscriber line charges and establishing an explicit universal service support fund for interstate access services. As the Commission explained, the aim of these reforms was “to provide more equal footing for competitors in both the local and long-distance markets, while still keeping rates in higher cost areas affordable and reasonably comparable with those in lower cost areas.”⁶⁴ Moreover, although the Commission has thus made significant strides in rationalizing the interstate access-charge structure – and although interstate switched access charges are, as the Commission found in the *CALLS Order*, just and reasonable – access-charge reform in the states has lagged. As a result, the historic rate structure that long characterized much of the industry – below cost basic local service rates supported by access charges – remains in place in many states.

The Commission cannot let Feature Group IP simply pull one leg – access charges – out from under the three-legged stool of LEC cost recovery without any corresponding mechanism to address the other two legs. Doing so in the one-sided, flash-cut manner suggested by Feature

⁶² See, e.g., Montana PSC Reply Comments, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, at 3 (FCC filed July 20, 2005) (“The ‘three-legged stool’ metaphor - access rates, universal service payments, and end-user rates - to describe the sources of support for ILECs that serve customers in rural and high cost areas is illustrative.”); Statement of PUC Commissioner Rachelle Chong, Item 58—Uniform Regulatory Framework (Aug. 24, 2006) at [ftp://ftp.cpuc.ca.gov/puc/aboutcpuc/commissioners/05chong/statements/commissioner+chong+urf_introduction_talk_points_082406_final.pdf](http://ftp.cpuc.ca.gov/puc/aboutcpuc/commissioners/05chong/statements/commissioner+chong+urf_introduction_talk_points_082406_final.pdf) (“I see regulatory reform for California as a three-legged stool. The first leg is to grant local carriers the pricing freedoms needed to meet competitors. . . . The next leg of reform is to update the universal service programs The third leg of reform is to reduce the high prices of switched access services”).

⁶³ *CALLS Order* ¶ 3.

⁶⁴ *Id.*

Group IP would set a dangerous precedent and seriously jeopardize the affordability and universal availability of local telephone service for countless consumers across the nation.

Feature Group IP has no tenable response to this point. Instead, it simply asserts, without explanation or support, that “ILECs cannot show that” forbearance “would . . . lead to such substantial increases in end-user rates that those rates would become unaffordable and subject to wide discrepancies between urban and rural areas, and the FCC and state commissions would refuse to address such discrepancies.”⁶⁵ But ILECs are not seeking forbearance here and nothing in section 10(a)(2) requires them to make such a showing. Rather, Feature Group IP is the party seeking forbearance and, under section 10, a forbearance petition may be granted only if the Commission finds the relief sought by the *petitioner* is not necessary for the protection of consumers. Moreover, Feature Group IP’s pure conjecture that the FCC and state commissions *might* be able to respond to the problems created by Feature Group IP’s proposal – a universal service crisis precipitated by plummeting access charge revenues – is plainly insufficient to satisfy that standard.

Indeed, it is in this respect that the limitations in Feature Group IP’s one-sided, flash-cut approach are perhaps most evident. Feature Group IP’s proposal is, at its core, a request that the Commission subsidize IP-based providers by excusing interexchange IP-PSTN traffic from the access charges that are due on all competing traffic that makes comparable use of the PSTN. That request for a subsidy, moreover, comes without any regard for – much less a mechanism to address – the potentially far-reaching effect Feature Group IP’s proposal would have on LECs’ access revenue and, hence, their ability to continue to provide service at the below-cost rates mandated in many states. Feature Group IP’s proposal, in short, addresses only one piece of the

⁶⁵ Petition at 72-73.

puzzle, and does so in a way that, while furthering Feature Group IP's business plan, would compromise universal service and thereby harm the interests of consumers.

Second, Feature Group IP's proposal would harm consumers by skewing investment and distorting competition. The Commission has long been "mindful that, in order to promote equity and efficiency, [it] should avoid creating regulatory distinctions based purely on technology."⁶⁶ Such distinctions create an uneven playing field that favors certain providers over others for no legitimate reason, thereby resulting in investment not on the basis of efficiency or innovation, but rather according to regulatory fiat. And that, in turn, frustrates the workings of the marketplace and ultimately harms consumers.

Feature Group IP disputes this point, contending that the subsidy it seeks will benefit consumers by promoting the use of IP-based "Group Forming Networks," which Feature Group IP asserts are being threatened by AT&T and other LECs.⁶⁷ Contrary to Feature Group IP's overheated and unsupported rhetoric, AT&T has no objection to the development of "Group Forming Networks" – on the contrary, AT&T is among the nation's leading providers of IP-enabled services, including network-based services, and it is aggressively pursuing new and innovative IP-based products and services that, it believes, will benefit consumers. At the same time, AT&T firmly believes – and Commission precedent teaches – that those IP-based products and services must stand on their own, without artificial subsidies to distort investment and skew the marketplace. As the Commission has explained, "IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid

⁶⁶ Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 98 (1998).

⁶⁷ See Petition at 73; see also *id.* at 9-12 & n.13 (defining and discussing "Group Forming Networks").

paying access charges.”⁶⁸ Feature Group IP’s proposal reflects precisely the opposite approach – one that would encourage IP-based entry not on the basis of technology or efficiency, but solely as a means to evade the lawful charges that apply to the use of the PSTN. Such arbitrage would retard investment and distort competition, thereby harming consumers, in conflict with the dictates of section 10(a)(2).

C. Feature Group IP’s Proposal Conflicts with the Public Interest

Finally, for similar reasons, the competition-distorting relief Feature Group IP seeks conflicts with the public interest. As the Commission has emphasized, the public interest favors “a straightforward, economically rational pricing structure which enables consumers to make a choice among competing providers through head-to-head comparisons and better promotes competition by sending potential entrants economically correct entry incentives.”⁶⁹ Feature Group IP’s proposal would have the opposite effect, undermining head-to-head competition and encouraging IP-based entry, not on the basis of its merits, but solely because of opportunities for arbitrage. Indeed, the public interest compels a regime in which all interexchange traffic that makes comparable use of the PSTN, including traffic that originates or terminates in IP, is subject to the *same* access charge structure. Because Feature Group IP’s proposal seeks the opposite outcome – i.e., a discriminatory regime in which IP-PSTN traffic alone is exempted from the access charges that apply to competing traffic – it does not “promote competitive market conditions.”⁷⁰ To the contrary, Feature Group IP’s proposal would grossly distort competition and, therefore, it is antithetical to the public interest.

⁶⁸ Order, *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 18 (2004) (“*IP-in-the-Middle Order*”).

⁶⁹ *CALLS Order* ¶ 78.

⁷⁰ See 47 U.S.C. § 160(b) (in determining whether forbearance would serve the public interest, the Commission “shall consider whether forbearance . . . will promote competitive market conditions”).

To gloss over this defect in its public interest showing, Feature Group IP again alleges that an access-charge exemption for IP-enabled traffic would “spur innovation” by “increase[ing] the uses of [group forming networks],” which in turn would drive broadband deployment.⁷¹ To be sure, innovation and broadband investment are laudable goals. But the way to advance those goals is to create competitively neutral rules that reward investment on the basis of efficiency and innovation, not, as Feature Group IP proposes, to single out one carrier’s technology of choice and grant it a subsidy that is denied the rest of the industry.⁷² Simply put, inefficient market entry induced by regulatory arbitrage is, as the D.C. Circuit explained in an analogous context, nothing more than “synthetic competition,” which, in all events, fails to serve the public interest.⁷³

III. FEATURE GROUP IP’S AD HOMINEM ATTACKS ON AT&T ARE IRRELEVANT AND IN ANY EVENT INACCURATE

As noted at the outset, Feature Group IP’s petition is littered with self-serving, ad hominem attacks on AT&T’s corporate character, which appear to stem from a dispute between AT&T Texas and UTEX, a Feature Group IP affiliate, that is now pending before the Texas

⁷¹ Petition at 56; *see id.* at 63-65.

⁷² Just as Level 3 did before it, Feature Group IP seeks forbearance from the application of access charges not just on IP-to-PSTN traffic, but also on what it terms “incidental PSTN-PSTN” traffic. *See* Petition at 13; *compare* Level 3 Petition at 7. Feature Group IP vaguely defines this traffic as involving PSTN-to-PSTN calls that traverse “an IP-based platform” and involve an unspecified “change in content and/or non adjunct-to-basic enhanced functionalities.” Petition at 13. The lack of clarity in this definition is reason enough to deny this aspect of Feature Group IP’s petition. In any event, the Commission has issued multiple orders that address whether and the extent to which access charges apply to PSTN-to-PSTN calls that rely on IP in the middle and that allegedly include enhanced functionality. *See IP-in-the-Middle Order*; Order and Notice of Proposed Rulemaking, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826 (2005); Declaratory Ruling and Report and Order, *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290 (2006) (“*Super Enhanced Prepaid Calling Card Order*”). Feature Group IP provides no reason for the Commission to depart from or alter the requirements established in those orders. Its petition should accordingly be denied in this respect as well.

⁷³ *USTA v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002).

PUC. Briefly stated, the dispute centers on AT&T Texas' effort to implement two provisions in the parties' interconnection agreement: The first provision requires UTEX to pay access charges on traffic that it delivers to AT&T Texas without Calling Party Number ("CPN") information, when UTEX fails to deliver CPN with at least 90% of its traffic. The second provision requires UTEX to pay access charges for interLATA traffic that UTEX delivers to AT&T Texas. For the last three years, UTEX has delivered substantial volumes of traffic to AT&T Texas without CPN, and much of the traffic that it has delivered with CPN has been interLATA. AT&T Texas has accordingly billed UTEX for access charges pursuant to the terms of the parties' interconnection agreement, but UTEX has simply refused to pay. In the dispute before the Texas PUC, AT&T seeks to collect those properly billed charges, and to ensure that, going forward, UTEX adheres to the terms of the agreement between the parties.

This dispute has absolutely nothing to do with any decision this Commission may make on Feature Group IP's forbearance petition. On the contrary, the dispute centers on *the language of the agreement between the parties*, and UTEX's failure to perform pursuant to that language. Indeed, the agreement includes specific language that defines "enhanced services" for purposes of the agreement and that accordingly determines the scope of the ESP Exemption to the extent it is addressed in the parties' agreement.⁷⁴ Moreover, any Commission decision to forbear would self-evidently operate only prospectively, and thus could not excuse UTEX from liability for the access charges it has accrued but failed to pay previously.

Nevertheless, and in all events, to ensure that the Commission is not misinformed by Feature Group IP's inaccurate description of AT&T Texas' position in the Texas PUC

⁷⁴ See AT&T Texas' Initial Brief, *Petition of UTEX Communications Corp. for Post-Interconnection Dispute Resolution with AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corp.*, Docket No. 33323, at 28-29 (Tex. PUC filed Dec. 21, 2007) ("AT&T Texas Br.") (attached hereto as Exhibit A).

proceeding, AT&T will respond briefly to Feature Group IP's central AT&T-specific claims below.⁷⁵

First, Feature Group IP repeatedly contends that AT&T's effort to collect access charges on IP-originated traffic in Texas is a reflexive attempt to stymie innovation and relegate end users to traditional, wireline-based technologies.⁷⁶ Again, the AT&T Texas-UTEX dispute is based on the fact that UTEX has, for the past three years, delivered traffic to AT&T without payment of the access charges that AT&T has billed pursuant to its access tariffs and the interconnection agreement between the parties. The parties have filed testimony and briefs on the issue, and it will be resolved in due course by the Texas PUC. It is, in short, a contract dispute. Feature Group IP's rhetorical attempt to describe it as something more is misplaced.

More generally, Feature Group IP's allegation that AT&T is attempting to stymie the growth of IP-based services ignores AT&T's actions in the marketplace. AT&T is in fact a leading innovator of both retail and wholesale IP-based services. Indeed, specifically with respect to enabling IP-enabled service providers to deliver traffic to the PSTN – exactly what Feature Group IP claims that AT&T is inhibiting – AT&T in the fall of 2007 announced that it had broadly *expanded* the availability of its Voice over IP Connect Service (“AVOICS”), which has been lauded by analysts as a “flexible wholesale VoIP service” that is “cost effective” and

⁷⁵ A full recitation of AT&T Texas' position in the proceeding before the Texas PUC is included in its opening brief, which is attached hereto.

⁷⁶ *See, e.g.*, Petition at 7 (accusing AT&T of attempting to “arbitrage the network effect of all inter-modal communications for its own ill-gotten gains at the expense of consumers, entrepreneurs, innovators, and the U.S. economy”) (emphasis omitted); *id.* at 11 (suggesting that AT&T is committed to “stifling innovation and invention”); *id.* at 16 (accusing AT&T of an “anti-competitive campaign to subvert the ability of new technology to be adopted in a competitive way”); *id.* at 38 (contending that “legacy networks need to keep groups from forming and becoming efficient in their use of communications to keep the existing billing paradigm alive”).

“widely available to U.S.-based VoIP carriers that are primarily terminating traffic in the U.S.”⁷⁷

Feature Group IP’s basic contention in this respect – that AT&T is attempting to inhibit the growth of IP-enabled services through preventing their termination over the PSTN – is thus plainly at odds with the facts.

Second, Feature Group IP objects to AT&T’s reliance on CPN to determine the jurisdiction of calls for purposes of intercarrier compensation.⁷⁸ This allegation likewise falls flat. As AT&T Texas explained in detail in its brief to the Texas PUC, the parties’ agreement imposes numerous compensation obligations on the parties, all of which are predicated on identifying the traffic exchanged between the parties as local, intraLATA, or interLATA. Under the plain terms of the agreement, that identification is based on comparing the originating NPA NXX with the terminating NPA NXX, and it can only work if the originating party passes CPN that contains Local Exchange Routing Guide (“LERG”)-assignable NPA NXXs that are assigned to specific rate centers.⁷⁹ Accordingly, when Feature Group IP takes issue with AT&T’s insistence on using numbers as determinative of jurisdiction, it is really taking issue with AT&T’s understanding of the terms of the interconnection agreement between the parties. And, although AT&T believes that its position is correct and will prevail before the Texas PUC, the more important point for present purposes is that the existence of this contract dispute has nothing to do with Feature Group IP’s request for forbearance.

⁷⁷ Current Analysis, *Fall VON 2007: AT&T Increases AVOICS’ Appeal with Expanded Availability and Network Capacity*, <http://www.currentanalysis.com/integrations/ireps/default553.aspx>; see AT&T News Release, *AT&T Announces Wholesale VoIP Service Expansion*, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=24626> (“AT&T continues to be a significant global player in wholesale VoIP and is enhancing its portfolio to continually meet evolving customer needs,” said Cindy Whelan, senior analyst, Business Network Services; Wholesale Services for Current Analysis Inc.”).

⁷⁸ See, e.g., Petition at 8 n.11, 9, 16 n.20, 27 n.31.

⁷⁹ See AT&T Texas Br. 9.

Beyond that, Feature Group IP's objection to passing CPN – and to using CPN to determine call jurisdiction – is at odds with industry standards. As this Commission is aware, and as AT&T Texas explained to the Texas PUC, the governing industry standards body – the Network Interconnection Interoperability Forum – recommends that the CPN field should be populated, by the originating network, with a valid, North American Numbering Plan 10-digit number that is programmed in the LERG.⁸⁰ Intermediary carriers, moreover, are charged with transmitting CPN along with the call.⁸¹ As the Commission has stressed, among the purposes of ensuring that CPN is passed with interexchange traffic is to permit “the carriers involved in the call . . . to determine the jurisdiction based on a comparison of the calling and called party telephone numbers.”⁸² Indeed, Feature Group IP itself concedes that, “[c]urrently, there is no industry-standard method for passing endpoint addressing information that is not in the form of a North American Numbering Plan (‘NANP’) address.”⁸³ Feature Group IP's proposal – that it be allowed to replace CPN with a unique addressing convention that suits its own purposes – is thus out-of-step with both industry standards and Commission rules.⁸⁴

Third, Feature Group IP raises a series of procedural concerns about the Texas proceeding. It asserts, for example, that it has been unable to obtain a hearing,⁸⁵ that it may be forced to post a bond to continue its operations,⁸⁶ and that AT&T has failed to produce

⁸⁰ *See id.* 10-11; 17-18.

⁸¹ *See* 47 C.F.R. § 64.1601.

⁸² *Super Enhanced Prepaid Calling Card Order*, ¶ 32.

⁸³ Petition at 43.

⁸⁴ AT&T recognizes the limits of using CPN as the basis for determining the jurisdiction of individual calls made using certain mobile or nomadic services (*e.g.*, wireless, VoIP), but unless and until the Commission and/or industry experts adopt new standards, Feature Group IP must not be permitted to simply ignore existing billing practices and procedures.

⁸⁵ *See* Petition at 35.

⁸⁶ *See id.* at 17-18 n.21, 50 n.53.

originating call detail records to support the access charges that it claims are due.⁸⁷ As to the first claim, the Texas PUC in fact held lengthy hearings on AT&T Texas' claim against UTEX this past fall.⁸⁸ As to the second claim, UTEX appears to be referring merely to AT&T Texas' unremarkable request to the Texas PUC that it require UTEX to honor the escrow clause in the parties' interconnection agreement, pursuant to which UTEX is required to pay disputed amounts into escrow (rather than avoid payment altogether, which has been UTEX's strategy to date). And, regarding the third claim, as AT&T Texas has explained to the Texas PUC, AT&T Texas has in fact produced in discovery extensive call detail records.⁸⁹ Each of these claims, in short, is pending before the Texas PUC and is in any event without merit. As with Feature Group IP's other AT&T-specific allegations, these claims provide no basis for Commission intervention in a proceeding that is presently pending before the Texas PUC.⁹⁰

Conclusion

The Commission should deny Feature Group IP's Petition.

⁸⁷ *See id.* at 50 n.53.

⁸⁸ To the extent UTEX is complaining about delay in arbitrating a new interconnection agreement, UTEX has sought relief in a case that is presently pending in federal district court in Texas. *See generally* Memorandum Opinion and Order, *UTEX Communications Corp. v. Public Util. Comm'n of Texas*, Cause No. A-06-CA-567-LY (W.D. Tex. Sept. 26, 2007) (dismissing as premature count challenging Texas PUC's handling of UTEX's arbitration request).

⁸⁹ *See* AT&T Texas Br. 45-46.

⁹⁰ Feature Group IP also asserts (at 59-60 n.82) that AT&T has "refused to route" traffic from a "non-geographic '500' number based service" that Feature Group IP has "launched." In fact, as the evidence before the Texas PUC makes clear, AT&T Texas has offered UTEX the capability it needs to route 500 numbers, and UTEX has declined to purchase it. *See* Rebuttal Testimony of Jason E. Constable on behalf of Southwestern Bell Telephone Company d/b/a AT&T Texas, Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution with AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corporation, Docket No. 33323, at 4-5 (Tex. PUC filed Oct. 29, 2007) ("AT&T Texas offers a tariffed service known as Advanced Carrier Identification Service ('ACIS'). When a carrier purchases this service, AT&T Texas implements switching translations to route the carrier's 500 traffic to the Carrier Identification code ('CIC') of the purchaser. In this way, the purchaser can use the non-geographic 500 numbers to provide services to end users in much the same way 900 service works. UTEX covets this functionality, but it refuses to purchase the tariffed service.").

Respectfully submitted,

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February 19, 2008

EXHIBIT A

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AT&T TEXAS' INITIAL BRIEF

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GLOSSARY OF ACRONYMS

AMA – Automatic Message Accounting	
AUR – Access Usage Records	
BAN – Billing Account Numbers	
CDR – Call Detail Records	
CLEC – Competitive Local Exchange Carrier	
CPN – Calling Party Number	
DPL – Decision Point List	
ESP – Enhanced Services Provider	
GTC – General Terms and Conditions	
ICA – Interconnection Agreement	
ILEC – Incumbent Local Exchange Carrier	
ISP – Internet Service Provider	
IXC – Interexchange Carrier	
LATA – Local Access Transport Area	
LERG -- Local Exchange Routing Guide	
MOU -- Minutes Of Use	
NANPA – North American Numbering Plan	
NPA-NXX – Numbering Plan Area Code – Central Office or Exchange Code	
POTS – Plain Old Telephone Service	
PSTN – Public Switched Telephone Network	
SS7 – Signaling System No. 7 (a global standard for telecommunications defined by the <u>International Telecommunication Union (ITU) Telecommunication Standardization Sector</u> (ITU-T). The standard defines the procedures and protocol by which network elements in the public switched telephone network (PSTN) exchange information over a digital signaling network to effect wireless (cellular) and wireline call setup, routing and control)	
VoIP – Voice Over Internet Protocol	
WSP – Wireless Provider	

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AT&T TEXAS' INITIAL BRIEF

INTRODUCTION

For the past three years, UTEX Communications Corp. ("UTEX") has been delivering traffic to AT&T Texas but has refused to pay the access charges that AT&T Texas has properly billed for termination services rendered to UTEX pursuant to the Interconnection Agreement ("ICA") between the parties. These access charges are based on two contractual provisions. The first provision imposes intraLATA access charges on traffic that UTEX delivers without Calling Party Number ("CPN") when UTEX fails to deliver CPN on at least 90% of its traffic. The second provision imposes access charges for interLATA traffic that UTEX delivers to AT&T Texas. In refusing to pay these charges, UTEX has been wrongfully obtaining local exchange and exchange access services from AT&T Texas for free. The parties' ICA plainly renders UTEX liable for these charges, and AT&T Texas is entitled to be paid. The Commission, as the regulatory body responsible for enforcing ICAs, should award AT&T Texas the amount sought in this arbitration.

But this case is about more than AT&T Texas' contract rights. It is about eliminating opportunities for regulatory arbitrage and traffic washing.¹ UTEX is delivering to AT&T Texas significant amounts of traffic that interexchange carriers ("IXCs") are routing through UTEX in an effort to circumvent both state and federal laws authorizing the imposition of access charges for long-distance traffic. UTEX protests that it has instructed its customers not to engage in this sort of activity, suggesting that such admonitions should be sufficient to address this problem.

¹ See Order No. 4 at 1 ("In the view of the Arbitrators, any reading of section 1.4.1 that absolved a party of the duty to provide valid CPN information would increase the possibility of arbitrage and traffic washing unnecessarily.").

UTEX's protests ring hollow. If the ICA means what UTEX would have it mean, there is nothing in the parties' ICA that would obligate UTEX to continue to issue such admonitions or in any way to police the activities of the entities participating in the delivery of this traffic. Under UTEX's interpretation, IXC's could utilize entities claiming to be Enhanced Service Providers ("ESPs") to avoid intercarrier compensation. Either UTEX owes intraLATA charges for failure to deliver CPN on at least 90% of its traffic, or it does not. Either UTEX owes interLATA charges for calls originating in a LATA different from the one in which they terminate, or it does not. Those are the contract questions, and it is only through resolving contract interpretation issues that the Commission can eliminate the opportunities for arbitrage that would exist under UTEX's interpretation of the ICA.

Much of the focus in this case has been on just what kind of traffic UTEX is delivering and whether UTEX's customers are ESPs. UTEX contends that it is an innovative carrier with new ideas and that AT&T Texas is simply behind the times. These assertions are wholly irrelevant and largely incorrect. While UTEX has not proven that it is delivering VoIP traffic or that its services offer anything new, whether UTEX's traffic is VoIP or UTEX is an innovative carrier does not change the compensation obligations arising from this traffic. The ICA provisions are technology neutral: They impose access charges regardless of the nature of UTEX's traffic. It is also irrelevant whether UTEX's customers are ESPs or not. To be exempt from local compensation under the ICA, the ESP must be the originator of the call. ESP involvement in the routing of this traffic does not exempt this traffic from access charges under the ICA. And, even if these customers are ESPs under some regulatory definition, they are nevertheless not ESPs as defined in the ICA. UTEX's reliance on its claim that it is delivering VoIP traffic is misplaced: VoIP services are not enhanced services under the ICA.

There can be only one reasonable interpretation of the parties' ICA, and that is the one proposed by AT&T Texas. If the Commission construes the ICA in the manner proposed by UTEX, every long-distance carrier in the state would be given the incentive to route its traffic through UTEX so that it could thereby avoid access rates. The parties to this ICA never contemplated such an outcome (nor did the Commission in approving the ICA), and the language of the agreement simply does not permit it.

I. RULES OF CONTRACT CONSTRUCTION.

As the Arbitrators note in Order No. 50, the Commission has before it key issues of contract interpretation regarding the meaning of Calling Party Number (“CPN”), ESP, Internet Service Providers (“ISP”) and various other terms in the ICA between AT&T Texas and UTEX. The meanings of these terms and the contract provisions in which they appear are readily ascertained by applying standard rules of contract construction to the plain language of the ICA and by using, where appropriate, expert testimony on the industry standards for the terms employed.

A. Ascertain Objective Intent Expressed in Agreement

Several key rules of contract construction apply. The primary goal in contract construction is to give effect to the parties’ intent *as expressed in the agreement*.² In other words, when possible, courts look to objective expressions of intent in the agreement itself, not to personal expressions about what one party or the other actually intended.³ When “contract language can be given a certain or definite meaning, then the language is not ambiguous and the court is obligated to interpret the contract as a matter of law.”⁴ If the contract can be read and understood without resort to extraneous evidence or testimony as to actual intent, courts will reject arguments that an agreement is ambiguous and will not consider testimony regarding the parties’ intent in executing it.

B. Consider Surrounding Circumstances, Including Industry Standards

When the meaning of particular terms in a contract cannot be ascertained without examining the circumstances surrounding the execution of the agreement, courts have held that those surrounding circumstances, including applicable industry standards, are properly considered even with respect to unambiguous contracts.⁵ The circumstances to be considered, however, “are not the parties’ statements of what they intended the contract to mean, but

² *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983).

³ *See In re Dillard Dep’t Stores, Inc.*, 186 S.W.3d 514, 515 (Tex. 2006) (“The objective intent as expressed in the agreement controls the construction of an unambiguous contract, not a party’s after-the-fact conduct.”).

⁴ *DeWitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999).

⁵ *See City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518-19 (Tex. 1968) (“Where a question relating to the construction of a contract is presented, as here, we are to take the wording of the instrument, consider the same in the light of the surrounding circumstances, and apply the pertinent rules of construction thereto and thus settle the meaning of the contract.”).

circumstances known to the parties at the time they entered into the contract, such as what the industry considered to be the norm or reasonable and prudent.”⁶

In conjunction with examining the surrounding circumstances, extrinsic evidence is properly considered to establish the “commonly understood meaning” of a term within a “specialized industry.”⁷ Thus, the Austin Court of Appeals has held that the Commission properly considered “evidence regarding the actual physical nature of ISP-bound calls and the state of the industry at the time the Agreement was executed.”⁸ The court noted that this type of evidence “differs from a consideration of ‘the parties’ statements of what they intended the contract to mean,’ which is prohibited when construing unambiguous contracts.”⁹

C. No Ambiguity If Only One Interpretation Is Reasonable

A contract is not ambiguous unless it “is susceptible to more than one reasonable meaning after application of established rules of construction.”¹⁰ In other words, for an ambiguity to exist, *both* opposing interpretations must be reasonable.¹¹ Thus, even if the contract language is not a model of clarity, courts will not find an ambiguity when, of the two proffered interpretations, only one is reasonable. In that instance, the contract is considered unambiguous and the sole reasonable interpretation controls.¹² As shown below, there is only one reasonable interpretation of the ICA, and that is the one proposed by AT&T Texas.

D. Harmonize And Give Effect To All Provisions; Avoid Inequity

Two more rules of contract construction should be kept in mind in determining the proper construction of the ICA. First, the entire document must be examined so as “to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.”¹³

⁶ *KMI Continental Offshore Prod. Co. v. ACF Petroleum Co.*, 746 S.W.2d 238, 241 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

⁷ *Mescalero Energy, Inc. v. Underwriters Indem. General Agency, Inc.*, 56 S.W.3d 313, 320 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

⁸ *GTE Southwest, Inc. v. Public Utility Comm’n*, 102 S.W.3d 282, 296 (Tex. App.—Austin 2003, pet. dismissed).

⁹ *Id.*

¹⁰ *Millenium One Communications, Inc. v. Public Util. Comm’n*, 361 F.Supp. 2d 634, 640 (W.D. Tex. 2005), *aff’d*, 170 Fed. Appx. 902 (5th Cir. 2006).

¹¹ *DeWitt County*, 1 S.W.3d at 100; *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996).

¹² See *Universal Health Services, Inc. v. Renaissance Women’s Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003) (holding that contract had only one reasonable interpretation and was therefore unambiguous, reasoning that “[l]ack of clarity does not create an ambiguity”).

¹³ *Cities of Abilene v. Public Util. Comm’n*, 146 S.W.3d 742, 747 (Tex. App.—Austin 2004, no pet.).

Second, courts are to “avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive.”¹⁴

II. HOW SHOULD CPN BE INTERPRETED UNDER THE ICA?

A. ICA provisions contemplate that CPN must provide sufficient information to jurisdictionalize calls exchanged between UTEX and AT&T Texas, and industry standards support the requirements imposed by the ICA.

The ICA defines CPN as the originating Calling Party Number – *i.e.*, the telephone number of the party originating a call.¹⁵ The meaning of CPN under the ICA, however, must also be determined in harmony with the provisions of the ICA that require CPN. CPN is a critical component of the provisions requiring inter-party compensation under the ICA. Attachment 12: Compensation of the ICA imposes numerous compensation obligations on the parties, all of which are predicated on identifying the traffic exchanged between the parties as either local, IntraLATA, or InterLATA traffic.¹⁶ Attachment 12 requires use of the originating number (*i.e.*, CPN) and terminating number for billing intercarrier compensation.¹⁷ In addition, § 7.5 of Attachment 12: Compensation provides: “Effective August 1, 1998, if the percentage of calls passed with CPN is less than 90%, all calls passed without CPN will be billed as IntraLATA Toll Traffic.” This latter provision is a mechanism to encourage passage of CPN, because a party that fails to meet the 90% requirement must pay access charges for *all* calls lacking CPN.

Because a comparison of the originating NPA NXX with the terminating NPA NXX determines whether the call is Local, IntraLATA or InterLATA under the ICA, CPN must contain Local Exchange Routing Guide (“LERG”) assignable NPA NXXs that are dedicated to specific rate centers. Attachment 12 cannot be effectively implemented unless CPN passed with a call provides sufficient information to jurisdictionalize a call. In addition, Attachment 21:

¹⁴ *Frost Nat’l Bank v. L&F Distributors, Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005).

¹⁵ See Joint Ex. 38A, GTC § 32.8 (“From the Effective Date of this Agreement through June 1, 1999, SWBT may audit CLEC’s operations, books, records, and other documents related to the development of the percent local usage (PLU)) to be used to measure and settle untransmitted calling party numbers (CPN) in connection with Attachment 12 Compensation.”); Attachment 12 Compensation § 2.2 (“Each Party will include in the information transmitted to the other for each call being terminated on the other’s network (where available), the originating Calling Party Number (CPN)”).

¹⁶ See, *e.g.*, Joint Ex. 38A, Attachment 12: Compensation, §§ 6.1 (“For interLATA traffic and intraLATA traffic, compensation for termination of intercompany traffic will be at access rates as set forth in each Party’s own applicable interstate or intrastate access tariffs.”)

¹⁷ See Joint Ex. 38A, Attachment 12: Compensation § 7.2.1 (“On a monthly basis, each Party will record its originating minutes of use including identification of the originating and terminating NXX for all intercompany calls.”); § 7.2.2 (“Each Party will transmit the summarized originating minutes of use from Section 7.2.1 above to the transiting and/or terminating Party for subsequent monthly intercompany settlement billing.”)

Numbering contemplates and requires the use of North American Numbering Plan (“NANP”) numbers, which are LERG assignable 10-digit numbers.¹⁸ The ICA further requires UTEX, “at a minimum,” to provide an originating NXX for each rate center in which it provides local exchange service in order to “enable [UTEX] and [AT&T Texas] to identify the jurisdictional nature of traffic for intercompany compensation.”¹⁹ This provision necessarily retains meaning as to *all* traffic that UTEX delivers in that it reaffirms the need for the parties to jurisdictionalize the traffic exchanged between them for compensation purposes. Because it is a basic rule of contract construction that the entire agreement is to be harmonized so as to ensure that each provision is effective and not rendered meaningless,²⁰ the Arbitrators should find that CPN must conform to all the requirements for CPN in the ICA.

B. AT&T Texas provided evidence of the industry standards for CPN, and those standards support the ICA’s requirements.

AT&T Texas’ witnesses presented the sole competent evidence of the applicable industry standards for CPN. AT&T Texas’ witness Bill Cole, who has over 25 years experience in telecommunications billings, testified that “CPN has a well-established, broadly understood meaning in the telecommunications industry. Valid CPN is a North American Numbering Plan (‘NANP’) 10-digit number that matches to the Local Exchange Routing Guide (‘LERG’).”²¹

AT&T Texas’ witness Jason Constable, who has nine years of experience in AT&T Network Operations, similarly testified:

The governing industry standards body—the Network Interconnection Interoperability Forum (“NIIF”)—has adopted the following industry practice for populating the CPN field: ‘The NIIF recommends that the calling party number field should be populated, by the originating network, with a valid 10-digit NANP subscriber line number or directory number.’ The focus of the NIIF, which

¹⁸ See AT&T Texas Ex. 18 (Constable Dir.) at 28; Joint Ex. 38A, Attachment 21: Numbering § 1.1 (“Nothing in this Section will be construed to limit or otherwise adversely impact in any manner either Party’s right to employ or to request and be assigned any North American Numbering Plan (NANP) numbers including, but not limited to, central office (NXX) codes pursuant to the Central Office Code Assignment Guidelines, or to establish, by tariff or otherwise, Exchanges and Rating Points corresponding to such NXX codes. Each Party is responsible for administering the NXX codes assigned to it.”).

¹⁹ See Joint Ex. 38A, Attachment 21: Numbering § 2.1 (“At a minimum, in those Metropolitan Exchange Areas where CLEC intends to provide local exchange service, CLEC shall obtain a separate NXX code for each [AT&T Texas] exchange or group of exchanges that share a common mandatory calling scope as defined in [AT&T Texas] tariffs. This will enable CLEC and [AT&T Texas] to identify the jurisdictional nature of traffic for intercompany compensation until such time as both parties have implemented billing and routing capabilities to determine traffic jurisdiction on a basis other than NXX codes.”)

²⁰ *Cities of Abilene*, 146 S.W.3d at 747.

²¹ AT&T Texas Ex. 17 (Cole Dir.) at 6, ll. 21-24.

includes telecommunications providers across the country, including all major providers, is on benefits to consumers and impact to company billing systems and public safety programs. None of the participating companies has expressed the desire for a CPN policy that even remotely resembles what UTEX advocates, nor have there been any discussions of using anything other than a 10-digit CPN format.²²

Applying these industry standards, Mr. Cole testified that AT&T Texas uses the following guidelines to determine whether a carrier has provided CPN on any particular call:

- 1) whether the CPN follows the 10-digit NANP standard;
- 2) whether the 10 digits are right justified in the CPN field;
- 3) whether the NPA-NXX of the CPN matches an entry on the LERG;
- 4) when CPN is greater than 10 digits, AT&T Texas will use the right 10 digits as the CPN;
- 5) when a seven-digit CPN is in the field, AT&T will treat the call as a 'local' call;
- 6) where there is no entry in the CPN field, AT&T Texas will determine that the CPN is invalid.²³

Mr. Cole also explained that CPN with 8YY, blanks, or zeros cannot constitute CPN under the ICA because such entries in the CPN field "provide no geographical point of reference" and therefore have an "unknown jurisdiction."²⁴ These types of entries leave the carrier transiting or terminating the call with no ability to determine whether the call is local or long distance. To treat 8YY, blanks or zeros as valid CPN would render ineffective the compensation mechanisms established in Attachment 12 of the ICA, because those mechanisms depend upon the ability of carriers to jurisdictionalize a call. Moreover, most carriers in Texas are granted room for error by the leeway afforded in this provision, which allows carriers to fail to deliver CPN on as much as 10% of their traffic with no obligation to pay intercarrier compensation for such calls. Most other ICAs contain this same provision,²⁵ and almost all carriers meet the 90% requirement.²⁶

²² AT&T Texas Ex. 18, (Constable Dir.) at 30, ll. 11-21.

²³ AT&T Texas Ex. 17, (Cole Dir.) at 9, ll. 6-15.

²⁴ *Id.* at 7, ll. 13-17.

²⁵ AT&T Texas Ex. 23, (Pellerin Dir.) at 22, l. 20.

²⁶ See AT&T Texas Ex. 28 (Dignan Reb.) at 9 ll. 17-21 ("As a rule, carriers pass adequate CPN and so there is no need to include a line for no-CPN calls on the bills that comply with standard industry formats. In that respect, UTEX is very much an outlier, and AT&T Texas has not reformatted its billing system to account for one anomalous company."); AT&T Ex. 31 (Layman Reb.) at 3, l. 13 ("It is relatively rare for a carrier to fail to pass CPN on 90% of its traffic.").

In addition, 8YY *is* an interexchange service subject to access charges.²⁷ Because the FCC has concluded that a call *to* an 8YY number is an interexchange call, it is reasonable to conclude that a call *from* an 8YY number would likewise be interexchange in nature. Imposing intraLATA access charges on 8YY traffic whenever a carrier delivering that traffic exceeds the 10% limit for invalid CPN is also wholly consistent with this Commission's treatment of 8YY traffic as subject to intraLATA access charges for purposes of intercarrier compensation. As the Commission has concluded, the vast majority of 8YY traffic *is*, in fact, long distance.²⁸ The Commission's conclusion makes sense. To the extent that 8YY numbers are used to originate a call, they would ordinarily be sent to invite the called party to return calls without having to pay otherwise imposed end user access charges, since the end user access charges would be paid by the owner of the 8YY numbers. A party placing a local call would not ordinarily use an 8YY number because the calling party would have to pay end user access charges for returned calls.

Finally, the fact that AT&T Texas' end users send almost no traffic back to UTEX²⁹ suggests that these 8YY numbers are not being used for the legitimate business purpose of soliciting call-backs but are, instead, being used for traffic washing. A review of the sampling of one hour of calls attached to the testimony of Bill Cole,³⁰ shows that a very high percentage of UTEX's calls are calls with 8YY numbers in the CPN field. In order to discourage arbitrage, the Commission should hold that 8YY numbers do not constitute CPN under the ICA.

C. AT&T Texas' interpretation of CPN is the only one that will prevent arbitrage.

Interpreting CPN in the manner proposed by AT&T Texas is the only reading that avoids the oppressive, unreasonable result prohibited by contract construction law.³¹ As this Commission observed in Docket No. 28821, in which it approved the 90% requirement for

²⁷ *In Re Toll Free Service Access Codes*, 2000 WL 87395, 15 FCC Rcd. 11,939, CC Docket No. 95-155, ¶ 2 (July 5, 2000) ("Toll free service is an interexchange service in which subscribers agree in advance to pay for all calls made to them using a predesignated toll free telephone number.")

²⁸ See Docket No. 28821, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Arbitration Award – Track I Issues, Reciprocal Compensation Issue SBC-22 (February 23, 2005) ("The Commission finds that IntraLATA 8YY traffic should not be subject to reciprocal compensation and should be treated the same as IntraLATA toll traffic. The Commission notes that residential and business subscribers purchase 8YY service from a provider so that distant family members or business clients may call the purchaser on a toll free basis. Therefore, it is reasonable to conclude that the majority of the 8YY calls are toll in nature. ... [T]he overwhelming majority of 8YY traffic is indeed intraLATA access with a de minimis amount terminating within the same local exchange as the location of the dialing party."). See AT&T Ex. 23 (Pellerin Dir.) at 22, ll. 5-19 (discussing this arbitration award).

²⁹ AT&T Ex. 18A, (Constable Dir.) at 22, ll. 4-22.

³⁰ AT&T Ex. 17A (Cole Dir.), Attachment WLC-1.

³¹ *Frost Nat'l Bank*, 165 S.W.3d at 312.

sending CPN, requiring carriers to pay access charges when they fail to send CPN at least 90% of the time serves to “minimize any potential for arbitrage.”³² UTEX’s proffered interpretations of CPN, if accepted, would maximize the opportunities for arbitrage and traffic washing by encouraging UTEX’s customers (or its customers’ customers) to manipulate CPN so as to thwart the ability of carriers to bill for long-distance traffic. If UTEX’s interpretation were accepted, UTEX would be entitled to turn a blind eye to traffic washing by its customers, and the 90% CPN requirement would fail to do what it was designed to do—viz., discourage arbitrage.

D. UTEX’s evidence on CPN is incompetent and not credible.

UTEX’s testimony regarding the proper definition of CPN is incompetent, not credible, and should be rejected. UTEX witness Lowell Feldman asserts that “UTEX’s interpretation was that its contract duty with regard to CPN was met if it passed the information it received from its customers.”³³ In other words, according to Mr. Feldman, UTEX can meet the 90% CPN requirement as long as it does not manipulate whatever information it receives from its customers. UTEX witness Soren Telfer’s position is no better. He asserts that as long as UTEX provides any number it receives – even a series of zeros or a single digit – UTEX has provided adequate CPN to satisfy the 90% requirement.³⁴ Both of these positions are illogical and would absolve UTEX of its contractual responsibilities under the ICA to pay intraLATA access charges when it fails to provide legitimate CPN that would enable AT&T Texas to jurisdictionalize calls and determine the appropriate compensation for them. While UTEX is plainly obligated under the ICA to pass the numbers that it receives in the CPN field and is prohibited from altering those numbers, UTEX is not excused from its obligation to pay intraLATA charges for failing to meet the 90% requirement simply because it has customers who either strip CPN or pass numbers that are inadequate to jurisdictionalize the traffic.

UTEX also argues that the parties should work together to establish a “policy” regarding how CPN is to be interpreted under the ICA.³⁵ This argument is a pretension that CPN is a matter still to be negotiated between the parties. The parties have a binding contract and the issue is not what sort of agreement the parties *should* negotiate but, instead, the meaning of the agreement that already exists.

³² AT&T Texas Ex. 23 (Pellerin Dir.) at 22, ll. 9-19.

³³ UTEX Ex. C (Feldman Dir.) at 81, ll. 9-11.

³⁴ UTEX Ex. A (Telfer Dir.) at 23, ll. 12-13; Tr. at 279, ll. 7-20.

³⁵ UTEX Ex. A (Telfer Dir.) at 3, ll. 14-17; UTEX Ex. C (Feldman Dir.) at 91, ll. 1-6.

Mr. Telfer attempts to dispute that AT&T's definition of CPN meets industry standards.³⁶ He has admitted, however, that his sole area of expertise is with respect to technology – not industry standards within the telecommunications business.³⁷ In fact, his reasoning reflects his expertise, which is confined to technology. Thus, he asserts, “There is absolutely no technical reason why the ‘CPN’ must be a LERG-active geographic North American Numbering Plan Administration (“NANPA”) 10 digit number.”³⁸ Mr. Telfer is incorrect. The “technical” reason for requiring CPN to be a LERG-active number is for purposes of compensation under the ICA. As the ICA’s compensation provisions are driven by ability to jurisdictionalize a call, requiring CPN to be a “LERG-active geographic NANPA 10 digit number” is essential for those compensation provisions to work.

Mr. Telfer’s assertion that there are no “technical” reasons to require CPN to be a LERG-active number is incorrect for additional reasons. As Mr. Constable explained:

CPN serves many useful functions within the industry. For example, customers rely on CPN to allow vertical services, like Caller ID and Call Return to function. Carriers commonly use CPN to determine whether traffic is local or interexchange. Law enforcement agencies rely on CPN being passed to assist in performing call traps and traces. 911 Public Services Answer Points (“PSAPs”) use CPN to query a location database that provides the address of the originating party. This is especially important in cases where the party in trouble may not be able to convey his/her location to the emergency responder so that the proper authorities can be dispatched.³⁹

CPN is “technically” important to enable customers to use Caller ID and Call Return and is vital to saving lives through 911 operations. It is also “technically” important for called Public Switched Telephone Network (“PSTN”) customers who want to block calls from pesky telemarketers because, as Mr. Feldman admitted at the hearing, calls to these PSTN customers by a caller using a number that is not found in the LERG cannot currently be blocked.⁴⁰

Mr. Feldman claims that “CPN does not exist in a VoIP network” and urges the Commission to allow non-geographic numbers to qualify as CPN.⁴¹ He observes that AT&T has commented that a phone number provided to a VoIP customer does not necessarily have to be

³⁶ UTEX Ex. A (Telfer Dir.) at 43-50.

³⁷ Tr. at 277, ll. 15-18.

³⁸ UTEX Ex. A (Telfer Dir.) at 10, ll. 9-10.

³⁹ AT&T Texas Ex. 18 (Constable Dir.) at 27, ll. 3-11.

⁴⁰ Tr. 84, l. 9 – 87, l. 14.

⁴¹ UTEX Ex. C (Feldman Dir.) at 96, ll. 10-16-

associated with a particular geographical location.⁴² The problem with such arguments is that the ICA *does* require jurisdictionalization of calls so that intercarrier compensation can be determined. UTEX does not have an agreement that permits carriers to ignore the requirement that calls be jurisdictionalized on the basis of NPAs (*i.e.*, area codes). It is certainly true that some calls, such as cell phone calls, may originate in a geographical location that does not correspond to the NPA assigned to the cell phone number. AT&T Texas has negotiated agreements with cell phone carriers to include factors addressing the mobility of cell phones.⁴³ But absent an agreement providing for a factor that makes allowances for these “moving” telephone numbers – and no such agreement exists in UTEX’s ICA – calls are necessarily jurisdictionalized on the basis of NPA NXXs.

Moreover, Mr. Feldman is mistaken in his claim that CPN has no relevance to a VoIP network. AT&T Texas has billing arrangements with other VoIP providers to jurisdictionalize traffic based on the CPN. For many VoIP operations, such a practice works as well as its circuit-switched counterparts because the VoIP service is designed to operate in a specific rate center. Thus, it operates much as a traditional plain old telephone service (“POTS”) does. Further, for a VoIP service to be a competitive alternative to traditional service, it must have CPN so that it can receive calls as well as make them. UTEX’s refusal to recognize the need for telephone numbers that would enable two-way traffic raises yet another red flag indicating that its business is directed toward facilitating one-way deliveries of IXC traffic.

UTEX’s criticism of AT&T Texas’ interpretation of CPN is based on irrelevant issues. For example, Mr. Feldman points out that the FCC, in developing requirements for CPN, did not design CPN as a billing tool.⁴⁴ This ignores the fact that the ICA *does* use CPN for billing. Additionally, the FCC *has* recognized that CPN is an appropriate tool for billing.⁴⁵ Hundreds of carriers, including all of the major telecommunications providers, use CPN to determine call jurisdiction and rates.⁴⁶ AT&T Texas is billed by hundreds of Competitive Local Exchange

⁴² *Id.* 109, ll. 16-21

⁴³ Tr. 415, ll. 7-16.

⁴⁴ UTEX Ex. C (Feldman Dir.) at 95, ll. 16-22.

⁴⁵ See *In Re Regulation of Prepaid Calling Card Services*, 2006 WL 1826190, 21 FCC Rcd. 7290, ¶¶ 32-33 (June 30, 2006) (noting that “carriers that use SS7 are required to transmit the CPN associated with an interstate call to interconnecting carriers,” holding that CPN “should be used for calling card traffic” to ensure accuracy in billing, and reasoning that “[t]his approach properly balances the need for accurate intercarrier billing records with the need of some carriers to use CN for their own retail billing purposes”).

⁴⁶ AT&T Texas Ex. 17 (Cole Dir.) at 22, ll. 3-4.

Carriers (“CLECs”), Incumbent Local Exchange Carriers (“ILECs”) and Wireless Providers (“WSPs”) on a monthly basis for the same types of traffic it bills to UTEX.⁴⁷ These other CLECs, ILECs and WSPs all use CPN information to determine the jurisdiction of a call and to bill AT&T Texas.⁴⁸

E. UTEX poses several irrelevant DPLs regarding CPN.

At UTEX’s request, DPLs 53 through 57 inquired about what SS7 standards and Telcordia AMA releases say about CPN, suggesting that SS7 standards and Telcordia AMA releases might have some relevant contribution to the no-CPN issue. They do not. Neither SS7 standards nor Telcordia AMA releases address CPN.⁴⁹ UTEX offered no evidence to the contrary.

UTEX tendered another “non-issue” in DPL 59, querying what number should be sent if there is more than one originating number. This question erroneously presupposes that UTEX has a role in creating CPN. It does not. Under the ICA, UTEX must pass the number it receives.⁵⁰ For those carriers that *do* have a role in designating CPN, those carriers should designate the line number (including NPA-NXX), if the calling party has both a line number and a main billing number.⁵¹

UTEX also raised red herrings in requesting DPLs 63 and 64, which ask what happens when UTEX sends AT&T Texas either 11-digit or 7-digit CPN. As AT&T Texas witness Bill Cole explained, if UTEX delivers more than 10 digits, only the right justified 10 digits are considered.⁵² Thus, this extra digit has no adverse consequences. Similarly, if UTEX delivers only 7 instead of 10 digits, AT&T defaults those calls to a local jurisdiction and does not impose access charges on them, as long the local number can be found in the LERG.⁵³

During the hearing on the merits, the Arbitrators found that DPL 66, which inquired whether AT&T Texas must route traffic to non-geographic numbers, was moot because the

⁴⁷ *Id.* at 22, ll. 4-7.

⁴⁸ *Id.* at 22, ll. 7-8.

⁴⁹ AT&T Texas Ex. 18 (Constable Dir.) at 29, l. 22; *id.* at 36, ll. 4-6.

⁵⁰ See Joint Exh. 38A, UNE Appendix, § 9.2.2.3 (“CLEC will transfer Calling Party Number Parameter information unchanged, including the ‘privacy indicator’ information, when ISUP Initial Address Messages are interchanged with the SWBT signaling network.”)

⁵¹ 47 C.F.R. § 64.1600 (providing that CPN is a line number).

⁵² AT&T Texas Ex. 17 (Cole Dir.) at 23, ll. 10-11.

⁵³ *Id.* at 23, ll. 11-13.

parties agreed that the answer to DPL 65 was that UTEX should not insert information into the CPN field.

F. UTEX does not seriously challenge AT&T Texas' testimony regarding industry standards for CPN.

In response to AT&T Texas' direct testimony setting out the industry standards for CPN, UTEX does not dispute those standards, but instead mocks them. Mr. Telfer uses the phrase "industry standard" only twice in his rebuttal. First, he characterizes AT&T Texas' witnesses as "invok[ing] their favorite *ipse dixit*: "It is Industry Standard."⁵⁴ He then describes NIIF as a "cartel of industry participants who continually mold the term "Industry Standard" to suit their current purposes."⁵⁵ The FCC thinks otherwise. FCC statements confirm that it considers NIIF an established and recognized group for establishing standards and practices in the telecommunications industry.⁵⁶

Mr. Feldman similarly does not make a serious attempt to rebut AT&T Texas' testimony on what constitute industry standards for CPN, but instead makes sweeping and irrelevant assertions. For example, he testifies that (1) he believes "industry" refers to "all things communicative," (2) "'Industry Standards' can be static or dynamic," (3) UTEX should be allowed to "help develop and shape emerging industry standards" so as to prevent the adoption of "perverse and cartel protecting standards," and (4) AT&T Texas' standards "will surely condemn Texas citizens to continued captivity to AT&T Texas' legacy way of thinking."⁵⁷ This testimony is not helpful and does not join issue on what the industry standards are for CPN. As such, it should be rejected as a basis for a different interpretation of what constitutes valid CPN under the ICA. While UTEX may be correct that the world is changing, the ICA is a static contract whose meaning does not change. The pertinent industry standards are not those that may be developed in the future, but instead those that existed when the ICA was initially

⁵⁴ UTEX Ex. A (Telfer Reb.) at 2, ll. 13-14.

⁵⁵ *Id.* at 16, ll. 13-14.

⁵⁶ See *In re New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, 2004 WL 1848248, 19 FCC Rcd. 16,830 at n. 236 (Aug. 4, 2004) (recognizing NIIF as source of "applicable industry standards and best practices"); *In re Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 1998 WL 34849, 13 FCC Rcd. 6040 at n. 87, ¶¶ 82-84 (Nov. 18, 1999) (discussing NIIF's role in determining technical feasibility of enhanced services); *FCC Announces the Next Meeting of the North American Numbering Council (NANC)*, 1997 WL 671600, 12 FCC Rcd. 17,614 (setting agenda for meeting and including as agenda item NIIF Report on Central Office Code and NPA Code Activation Issues).

⁵⁷ UTEX Ex. C (Feldman Reb.) at 16, ll. 14-17; *id.* at 17, ll. 3-5; *id.* at 20, ll. 14-16; *id.* at 24, ll. 20-23.

created.⁵⁸ As this ICA is almost 10 years old, UTEX's criticism of industry standards as antiquated only confirms that these standards *are* the correct ones.

G. AT&T Texas has breached no duties under § 2.4 of Attachment 12.

In Order No. 50, the Arbitrators directed the parties to brief the meaning of § 2.4 of Attachment 12 and its “impact, if any, on the claims and cross-claims of the parties.” Section 2.4 states: “Where one Party is passing CPN but the other Party is not properly receiving information, the Parties will cooperatively work to correctly rate the traffic.” As its plain language indicates, this provision is intended to address those circumstances where one carrier delivers CPN but the party to whom it is delivered somehow fails to receive it. This provision obligates the parties to work together to “rate” this traffic. To “rate” traffic is to determine its price⁵⁹ – *i.e.* to determine whether to treat this traffic as local or long distance and, if long distance, whether Intra- or Inter LATA and Intra- or Interstate. For the reasons shown below, this provision is not an issue in this docket.

It is undisputed that AT&T Texas experienced problems with data delivered to it by UTEX because of recording errors at two of AT&T Texas' switches.⁶⁰ It is also undisputed that AT&T Texas repaired the switches and credited UTEX for charges previously made on the basis of no-CPN on calls delivered to those two switches during the problem period.⁶¹ AT&T Texas treated all traffic delivered to those switches during the period of malfunction as containing adequate or valid CPN.⁶² In other words, instead of seeking to rate the traffic delivered through these two malfunctioning switches, AT&T Texas treated all traffic as compliant with the requirement to deliver CPN, even though historical trends would support a determination that a substantial percentage of that traffic lacked CPN. Thus, while AT&T Texas would have had a right to require UTEX to “work cooperatively” to rate this traffic and estimate what amount lacked valid CPN, AT&T Texas simply made a business decision to forgo any revenue that it

⁵⁸ See *KMI Continental Offshore Prod. Co.*, 746 S.W.2d at 241 (noting relevance of industry standards applicable at time contract created).

⁵⁹ See NEWTON'S TELECOM DICTIONARY at 570 (17th ed. 2001) (“Rate. The price of a particular service or piece of equipment from a telephone company.”); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE at 1602 (2d ed. 1987) (defining “rate” as a verb to mean, *inter alia*, “to estimate the value or worth of,” “to make subject to the payment of a certain rate or tax”).

⁶⁰ AT&T Texas Ex. 17 (Cole Dir.) at 14, l. 21 – 15, l. 3.

⁶¹ *Id.* at 15, ll. 4-8.

⁶² *Id.*

may have been legally entitled to receive as compensation for no-CPN on calls delivered through these two switches.

AT&T Texas also did not seek to determine whether any of the traffic delivered over these malfunctioning switches was InterLATA and, therefore, subject to access charges. In other words, while AT&T Texas had a contractual right to require UTEX to work cooperatively with AT&T Texas to rate this traffic with respect to whether it was interLATA traffic and subject to access charges, AT&T Texas simply made the business decision to forgo the potential revenue and eliminated any issue of proper rating under § 2.4.

In his direct testimony, UTEX witness Lowell Feldman asserts that “AT&T” [sic] failure to advise UTEX that AT&T was purportedly not receiving CPN was a breach of Attachment 12 § 2.4.”⁶³ This claim is based on a misreading of § 2.4 and a misuse of the facts. AT&T Texas, which did not discover the switch recording error until early 2006, promptly advised UTEX of the problem, corrected it, and gave UTEX the credit.⁶⁴ It is not a breach of § 2.4 for AT&T Texas to have failed to detect the switch recording errors. Section 2.4 speaks to what the parties are to do when such an error is discovered. Moreover, UTEX suffered no harm from AT&T Texas’ error because UTEX never paid any of its bills for no-CPN, and therefore never paid any of the billings associated with these recording errors. All that happened as a result of this error was that the unpaid bills were somewhat higher than they should have been. And that problem was promptly corrected by the issuance of the credit. There was no issue of rating the traffic because AT&T Texas simply treated all of the traffic from these malfunctioning switches as non-compensable.

Mr. Feldman erroneously asserts AT&T Texas has some general obligation under § 2.4 to work with UTEX to rate *all* of the traffic exchanged between AT&T Texas and UTEX. Thus, Mr. Feldman complains that “AT&T has made up its own mind on how it will rate and there has been absolutely no attempt to negotiate or cooperate so the parties could obtain a ‘correct rating.’”⁶⁵ Mr. Feldman misreads § 2.4. Section 2.4 applies to the duty to work cooperatively to rate traffic when there is a routing or recording error on the part of one of the carriers. This

⁶³ UTEX Ex. C (Feldman Dir.) at 74, ll. 6-7.

⁶⁴ AT&T Texas Ex. 17 (Cole Dir.) at 14, l. 21 – 15, l. 15; *see also* AT&T Texas Ex. 19 (Dignan Dir.) at 12, ll. 6-26 (discussing discovery of error and credit issued for same); *see also* AT&T Texas Ex. 19B (Dignan Errata) at 12 (correcting identification of BANs as being in San Antonio and Austin LATAs rather than Houston and San Antonio LATAs); Tr. 716, l. 25 – 717, l. 9.

⁶⁵ UTEX Ex. C (Feldman Dir.) at 74, ll. 9-11.

provision has nothing to do with rating traffic that can be properly jurisdictionalized under the existing terms and conditions of Attachment 12 or for traffic for which the originating carrier did not send CPN. The parties have already agreed to those terms. There is nothing to negotiate or work out with respect to traffic that can be jurisdictionalized and rated as either InterLATA or IntraLATA Interexchange. Nor is there anything to negotiate or work out with respect to UTEX's obligation to pay access charges for traffic when it fails to deliver CPN on at least 90% of the traffic it sends to AT&T Texas. That obligation is already clearly defined in the contract.

III. WHAT IS THE PROPER INTERPRETATION OF §§ 1.4 AND 1.4.1 OF ATTACHMENT 12?

A. Sections 1.4 and 1.4.1 apply only to calls that originate and terminate within a local calling area.

A central issue in this case is the treatment of traffic to and from ESPs. UTEX claims that all of the traffic it delivers to AT&T Texas is traffic from ESPs and, as such, is exempt from any form of compensation under the ICA. For a variety of reasons, UTEX is mistaken. UTEX's argument is predicated on § 1.4.1 of the ICA, which is a provision that establishes an exemption with respect to ESP traffic. Section 1.4.1 states:

No compensation is due or payable to either Party for traffic that is destined for or received from an Enhanced Service Provider ("ESP") as defined in section 53.7 of the general terms and conditions of this Agreement.

Read in isolation, this provision might be construed to apply to any and all traffic to or from an ESP. Basic rules of contract construction, however, do not permit an isolated reading of a contract clause. Instead, courts (and Commissions) must examine the entire contract so as "to harmonize and give effect to all the provisions."⁶⁶ "Courts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract."⁶⁷ This path of isolation is precisely the path UTEX would erroneously have this Commission take.

The other, related provisions of Attachment 12 and the circumstances surrounding the creation of this ICA strongly indicate that § 1.4.1 was intended solely to establish a no-compensation regime for calls to or from ESPs only when those calls are completed within a single local exchange or mandatory calling area.

⁶⁶ *Cities of Abilene*, 146 S.W.3d at 742.

⁶⁷ *State Farm Life Ins. v. Beaton*, 907 S.W.2d 430, 433 (Tex. 1995).

The first mention of ESPs in Attachment 12 is found in § 1.2, which defines what constitutes “Local Traffic” for purposes of the compensation provisions in Attachment 12. Section 1.2 states:

Calls originated by CLEC’s end users and terminated to SWBT’s end users (or vice versa) will be classified as “Local Traffic” under this Agreement if: (i) the call originates and terminates in the same SWBT exchange area; or (ii) originates and terminates within different SWBT Exchanges that share a common mandatory local calling area *Local traffic includes traffic to or from enhanced service providers.*

(Emphasis added). This provision mirrors § 53.11 of the General Terms and Conditions (“GTC”) portion of the ICA, which contains essentially the same definition of Local Traffic “for purposes of intercompany compensation.”⁶⁸

The circumstances surrounding the addition of the phrase “Local traffic includes traffic to or from enhanced service providers” in §§ 1.2 and 53.11 demonstrate that this definition was intended solely to establish that calls to or from ESPs that are completed within the local calling area would be treated as Local Traffic. These provisions were created after the Commission’s decision in the *Time Warner* arbitration in Docket No. 18082, in which the Commission held that local traffic would include calls to Time Warner’s Internet Service Provider (“ISP”) customers. The *Time Warner* decision was issued on February 27, 1998. In *Time Warner*, the Commission reasoned that, even though calls to ISPs were interstate in the sense that calling parties could access the World Wide Web through their ISPs, such calls would nevertheless be treated as local under the *Time Warner* ICA.⁶⁹ The initial arbitration for Waller Creek Communications Inc., whose ICA UTEX elected to adopt, was pending at the same time as the *Time Warner* arbitration. The initial ICA in the Waller Creek Arbitration in Docket No. 17922 was filed in June 1998, a few months after the *Time Warner* decision holding that ISP traffic would be treated as local traffic, and the UTEX ICA reflected this holding in the definitions of Local Traffic found in §§ 1.2 and 53.11.

⁶⁸ Joint Ex. 38A, GTC § 53.11 states: “Local Traffic,” for purposes of intercompany compensation, is if (i) the call originates and terminates in the same SWBT exchange area; or (ii) originates and terminates within different SWBT Exchanges that share a common mandatory local calling area *Local traffic includes traffic to or from enhanced service providers.*” (Emphasis added.)

⁶⁹ *Complaint and Request for Expedited Ruling of Time Warner Communications*, PUC Docket 18082, Final Order at 4 (Feb. 27, 1998).

The context of the Commission's decision in *Time Warner* makes clear that what the parties were addressing in §§ 1.2 and 53.11 was what would be defined as Local Traffic under the ICA and whether Local Traffic to or from ESPs would be treated any differently than Local Traffic to or from other end users. In other words, §§ 1.2 and 53.11 incorporated the Commission's decision in the *Time Warner* case regarding what would be considered Local Traffic under an ICA.

Southwestern Bell appealed the *Time Warner* decision but the federal courts affirmed the Commission, with the Fifth Circuit issuing its opinion in March of 2000.⁷⁰ Section 1.4 was amended and § 1.4.1 was added to the Waller Creek ICA in January 2000, while the *Time Warner* case was pending in the Fifth Circuit.⁷¹ Section 1.4 of Attachment 12: Compensation provides the basic compensation mechanism for Local Traffic, as that term is defined in § 1.2. Section 1.4 states:

Unless and until the Out of Balance Threshold (as defined in this Section) is met, Bill and Keep will be the reciprocal compensation arrangement for Local Traffic, as defined herein, for the duration of this Agreement. Every six (6) months, beginning with six (6) months after the Amendment Effective Date, the Parties will assess whether the volumes of Local Traffic originated by one Party and terminating on the other Party's network exceeds by more than ten percent (10%) of the larger volume of traffic the volume of Local Traffic originated by the other Party and terminating to the first Party's network, or vice versa ("Out of Balance Threshold"). The Out of Balance Threshold should be calculated on a per-minute basis. If the Out of Balance Threshold is met and for as long as it continues to be met, SWBT and CLEC will compensate each other for all calls unless the Parties agree to some form of netting arrangement. The reciprocal compensation rates as adopted herein apply to calls that originate and terminate within the mandatory single or multiexchange local calling area of SWBT including the mandatory EAS areas served by SWBT. Bill and Keep does not apply to Transit nor Optional Calling Area Traffic.

Section 1.4 establishes that compensation for Local Traffic will generally be "bill and keep" – *i.e.*, neither party will compensate the other for handling that traffic – unless the local traffic becomes sufficiently "Out of Balance" to warrant compensation. Bill and keep is a common arrangement between carriers when it appears that the compensation each would owe to the other

⁷⁰ See *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 482 (5th Cir. 2000) (upholding Commission's conclusion that "a call between two end users in the same local calling area is local traffic" under the *Time Warner* ICA).

⁷¹ UTEX Ex. 269 at 15452.

would be approximately the same and therefore cancel out any net payment owed to one particular carrier.⁷² The “Out of Balance” threshold protected either carrier from having to perform more than its share of the work in originating or terminating calls if the amount of traffic was heavily weighted in either direction.

Absent any additional provisions, § 1.4 would have governed traffic to or from ESPs that began and ended within the same local calling area. The ICA, however, added § 1.4.1, which eliminated the Out of Balance threshold for ESP traffic by expressly providing that there would be no compensation at all for “traffic that is destined for or received from” an ESP. This added provision was not intended to convert long-distance calls placed by or to ESPs into “Local Traffic” and exempt those calls from the compensation arrangements applicable to them under other provisions of the ICA. It was instead intended only to eliminate any possible compensation for “Local Traffic” to or from ESPs.

That § 1.4.1 has the limited purpose of eliminating compensation for “Local Traffic” to or from an ESP is confirmed by the circumstances surrounding the dispute over ISP traffic that was ongoing both when this ICA was first approved in 1998 and when the amendment adding § 1.4.1 was added to the Waller Creek ICA in January 2000. As the *Time Warner* decision makes clear,⁷³ there was a vigorous dispute in the telecommunications industry regarding what type of compensation should be provided for calls placed to ISPs, a type of ESP that, at the time, was the principal mechanism for accessing the Internet. Telephone customers typically accessed the Internet through “dial-up” service whereby they called their ISP. Because calls to the Internet were frequently of very long duration, the local exchange carrier that provided local business lines to the ISP often became entitled to hefty compensation from carriers whose customers called that ISP. This occurred because, under a typical reciprocal compensation regime for originating and terminating local traffic, the local exchange carrier terminating the calls to its ISP customers would be entitled to compensation from the other carrier based on the minutes that the line was in use. Elimination of the Out of Balance Threshold for Local Traffic to or from ESPs eliminated the possibility that either SWBT or Waller Creek would be in a

⁷² See, e.g., *Iowa Network Servs., Inc. v. Qwest Corp.*, 363 F.3d 683, 688 (8th Cir. 2004) (noting that a bill and keep arrangement is “appropriate when ‘the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction,’” quoting 47 C.F.R. § 51.713(b)).

⁷³ See *Southwestern Bell Tel. Co.*, 208 F.3d at 477-78.

position to collect this kind of compensation under the Waller Creek ICA if either of them garnered a substantial amount of ISPs as customers. To read § 1.4.1 as extending beyond “Local Traffic” is inconsistent with all of these circumstances surrounding the negotiation of these terms.

UTEX’s broad reading of § 1.4.1 is also inconsistent with § 1.1 of Attachment 12. Under UTEX’s reading, calls to or from ESPs are in a unique category that need not be either Local or Interexchange or any other type of traffic. Section 1.1, however, does not permit traffic to be so undefined. Section 1.1 expressly states:

For purposes of compensation under this Agreement, the telecommunications traffic traded between CLEC and SWBT will be classified as either Local Traffic, Transit Traffic, Optional Calling Area Traffic, IntraLATA Interexchange Traffic, InterLATA Interexchange Traffic, FGA Traffic, or Cellular Traffic.

As these terms plainly provide, traffic *must* be defined as one of these 7 types of traffic. The exemption in § 1.4.1 can be reasonably read to apply only to the Local Traffic defined in § 1.2, since (1) it immediately follows § 1.4 and (2) no exemptions for ESP traffic are contained in any of the provisions addressing compensation for these other types of traffic. The only places ESPs are mentioned in these compensations provisions are in § 1.2 of Attachment 12, where Local Traffic is defined, and in § 1.4.1 of Attachment 12, where the general bill-and-keep arrangement for Local Traffic is eliminated for calls to or from ESPs. As § 1.4.1 is plainly a subset of § 1.4, which establishes bill-and-keep as the general rule for Local Traffic, it is unreasonable to apply this exemption to any form of traffic other than the Local Traffic addressed therein.

The structure of Attachment 12 as a whole indicates that § 1.4.1 was intended to address only those calls to or from ESPs that are completed within a local calling area, not calls that originate and terminate in different exchanges and that would ordinarily be characterized as long distance. UTEX’s contention that § 1.4.1 was intended to exclude from any compensation all calls to or from ESPs, even when the calls are originated in California or a foreign country, is not a reasonable reading of this provision and improperly ignores the other provisions in the ICA, as well as the circumstances surrounding the creation of these provisions.

B. Section 1.4.1 does not apply to calls *through* an ESP.

UTEX is also incorrect in its claim that § 1.4.1 provides an exemption for traffic simply because an ESP has some intermediate involvement in the delivery of the traffic. UTEX’s claim is that all of the traffic it delivers to AT&T Texas is exempt from compensation pursuant to

§ 1.4.1 because UTEX receives all of this traffic from its customers and those customers are all ESPs. Section 1.4.1, however, does not exempt calls from compensation simply because an ESP has some role in the delivery of those calls. Section 1.4.1 exempts calls that are “destined for or received from” an ESP. This language refers to when an ESP is either the calling or the called party. It is undisputed that the called parties are not ESPs and, as UTEX has admitted, the calling parties are also not ESPs.⁷⁴ Instead, UTEX claims that the ESP is the UTEX customer that delivers this traffic to UTEX. Even assuming that these UTEX customers are, in fact, ESPs within the meaning of the ICA (a matter AT&T Texas disputes and will disprove below), these calls are not calls “received from” an ESP. Instead, they are calls received from the calling parties, whom UTEX has admitted are *not* ESPs.

UTEX’s interpretation of § 1.4.1 would require treating calls “destined for or received from” an ESP to include entities that are merely involved in the delivery of this traffic. Such an interpretation is inconsistent with the other provisions of Attachment 12, which make clear that calls are defined, for purposes of compensation, on the basis of who originates and terminates those calls, not on the basis of which carriers or entities are involved in the delivery of the traffic. Thus, § 1.2 of Attachment 12 defines “Local Traffic” as “[c]alls *originated* by CLEC’s end users and *terminated* to SWBT’s end users.” (Emphasis added.) Similarly, compensation for the termination of InterLATA, Local, Transit and Optional Calling Area Traffic is determined in accordance with the minutes of use of “the *originating* and *terminating* NXX for intercompany calls.”⁷⁵ (Emphasis added.) Plainly, the compensation provisions of Attachment 12 contemplate that calls are “destined for” the called end user with a terminating NXX and calls are “received from” the calling end user with the originating NXX. It is undisputed that UTEX’s customers – regardless of their ESP status – are neither the calling party with the originating NXX nor the called party with the terminating NXX.

But even if the Commission were inclined to accept the argument that one could look at an entity other than the calling party in determining from whom the call is “received,” it would still be illogical to conclude that a UTEX customer is the entity from whom a call is “received.” All of these calls are delivered to AT&T Texas by UTEX. If one does not consider the calling

⁷⁴ Tr. at 305, l. 18 – 306, l. 11 (In response to question as to whether “individuals actually placing the calls – are not ESPs,” Mr. Telfer stated, “My understanding is that the end users themselves are not enhanced service providers” and further clarified that any enhancements that occur happen “between origination and termination.”).

⁷⁵ Joint Ex. 38A, Attachment 12: Compensation § 7.2.1.

party as the entity from whom the call is “received,” the next logical entity is UTEX itself, from whom AT&T Texas directly “receives” the call. It is undisputed that UTEX is not an ESP.⁷⁶ Moreover, if, as UTEX claims, its customers are not carriers, there must be some additional carrier involved in the call, somewhere between UTEX’s customer and the hand-off to UTEX, since the overwhelming majority, if not all, of these calls are from the public switched telephone network (“PSTN”).⁷⁷ Only carriers can handle traffic on the PSTN. UTEX fails to explain why its ESP customers should be designated as the entity from whom this traffic is “received” when at least one (*i.e.*, UTEX) and often two (*i.e.*, UTEX and another IXC) are involved in the delivery of this traffic.

UTEX’s claim that it requires its customers to maintain a virtual presence in the LATA where the call is terminated⁷⁸ suggests that UTEX seeks to have its so-called ESP customers be treated as originating the calls. UTEX attempts to bolster this argument with the claim that its ESP customers are “end users,” suggesting that calls should be deemed “originated” by UTEX’s customers rather than by the person or entity who actually places the call. This argument is a misuse of the “end user” concept, which was developed by the FCC for the purpose of allowing ESPs in certain limited circumstances to purchase retail business services rather than exchange access services.⁷⁹ Thus, under the FCC’s ESP Exemption Order, ESPs were “treated as end users for purposes of applying access charges.”⁸⁰ When and if the exemption applies it enables ESPs to “pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices” and to “pay special access surcharges for private lines” pursuant to FCC rules.⁸¹

The FCC-created fiction of ESPs as “end users” has no application to the parties’ ICA provisions regarding inter-carrier compensation under Attachment 12. This FCC rule cannot be a basis for ignoring the true nature of the traffic delivered by UTEX to AT&T Texas. UTEX cannot break a call into two parts and ignore its actual origination by inserting an ESP into the routing processes for a call. To argue that UTEX’s ESP customer somehow breaks the call into

⁷⁶ Tr. at 308, ll. 19-20.

⁷⁷ See AT&T Ex. 18A (Constable Dir.) at 7, l. 6 – 12, l. 5.

⁷⁸ UTEX Ex. A (Telfer Dir.) at 67, ll. 15-20.

⁷⁹ *In Re Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Docket NO. 87-215, 3 FCC Rcd. 2631, 1988 WL 488404, ¶ 2, n.8 ((April 27, 1988).

⁸⁰ *Id.*

⁸¹ *Id.*

two parts so that the ESP replaces the calling party as the party that originates the call is neither reasonable nor logical.

There is nothing in FCC rules that would permit such a bifurcation of these calls. In fact, to the extent the FCC speaks to this issue at all, it has rejected such a concept, holding that calls initiated as a “traditional interexchange call by an end user who dials 1+ the called number from a regular telephone” and subsequently converted into an IP format only to be converted back into traditional format for termination on the PSTN provide no enhanced functionality and are subject to access charges.⁸² The *IP-In-The-Middle Order* expressly rejects the notion that a service of this type “is the kind of use of the ‘Internet or interactive services’ that Congress sought to single out for exceptional treatment.”⁸³ The FCC order treats each of these IP-In-The-Middle calls as a single call, refusing to bifurcate them so as to allow the avoidance of access charges. The Commission in this case should similarly reject UTEX’s claims here.

But regardless of any possible interpretation by the FCC in its IP-In-The-Middle Order, the parties’ ICA does not permit such a strained fiction. Even if UTEX’s customers could be viewed as end users because they receive telecommunications services from UTEX, those customers are *not* the parties that *originate* the calls that are subject to Attachment 12. Therefore, these calls are not “received” from UTEX’s customers, and § 1.4.1 does not apply.

Moreover, any claim by UTEX that its customers could create a new origination of the call by “meeting” UTEX in the LATA where the call is terminated is based on pure fiction. As Soren Telfer admitted in the hearing, the “situs” where UTEX’s customers hand off a call to UTEX is not even a real, physical location within the LATA. Mr. Telfer testified that “[i]n principle and in fact,” UTEX’s customers “do not actually have to meet UTEX physically in the LATA.”⁸⁴ Per Mr. Telfer, the situs where UTEX customer delivers the call to UTEX “is not something which has a physical extension,” “doesn’t have a geographical location,” and “is a nongeographical concept.”⁸⁵

UTEX also cannot argue that treating its ESPs as originating calls is the only way that ESPs *could* ever originate calls. Calls *can* be legitimately originated by ESPs. For example,

⁸² *In re Petition for Declaratory Ruling that AT&T’s Phone-To-Phone IP Telephony Services are Exempt from Access Charges (“IP-In-The-Middle Order”)*, 2004 WL 856557, 19 FCC Rcd. 7457 at ¶ 1 (Apr. 21, 2004).

⁸³ *Id.* at ¶ 17.

⁸⁴ Tr. at 298, l. 20 – 299, l. 1.

⁸⁵ Tr. at 299, ll. 13-14; 300, ll. 20-21; 301, l. 2.

ESPs can and do have the capacity to store voice-mail messages and develop programs to call parties and play recorded messages on a selected time or day. Reading § 1.4.1 as exempting only calls that are, in fact, actually originated by or terminated to ESPs is the only reasonable interpretation that can be given to this provision.

C. UTEX's customers are not ESPs within the meaning of the ICA.

1. Only providers of voice mail, tele-messaging and Internet are ESPs under the ICA.

UTEX's argument that all of its traffic falls within the exemption of § 1.4.1 also fails because its customers are not ESPs within the meaning of the ICA. Section 53.6 of the GTC defines "enhanced services" under the ICA as follows: "Enhanced service" means voice mail, Internet service, and tele-messaging services and other services both parties *mutually agree* are enhanced services." (Emphasis added.) Section 53.7 of the GTC defines ESPs to "include but are not limited to voice mail companies, Internet Service Providers and tele-messaging companies." These two provisions must be read together.⁸⁶ Read together, it is clear that ESPs are limited to providers of voice mail, Internet service, and tele-messaging services unless AT&T Texas and UTEX "mutually agree" to add additional enhanced services to those already defined in the ICA. AT&T Texas has not so agreed⁸⁷ and, therefore, the only entities that may qualify as ESPs under the express terms of the ICA are those entities that provide voice mail, Internet service, or tele-messaging services.

Moreover, in order to give meaning to the express limitations placed on what is and what is not an ESP under the ICA, enhanced service providers must actually be providing voice mail, Internet service or tele-messaging services in conjunction with their participation in traffic covered by the ICA in order to qualify for the ESP exemption in § 1.4.1. Otherwise, an entity ostensibly capable of providing these services with respect to the traffic delivered by UTEX to AT&T Texas would arguably be able to trigger this no-compensation provision even though none of the services contemplated by the ICA were being performed. Such undermining of the restrictions created by § 53.6 of the GTC is contrary to the basic rule of contract construction

⁸⁶ *Cities of Abilene*, 146 S.W.3d at 742.

⁸⁷ AT&T Texas Ex. 23 (Pellerin Dir.) at 41, ll. 6-12; Joint Exh. 38A.

that, when possible, provisions will be read so that each provision has meaning and is effective.⁸⁸

2. UTEX has provided no credible evidence that its customers provide voice mail, tele-messaging, or access to the Internet.

UTEX has failed to provide any credible evidence that its customers provide voice mail or tele-messaging services as part of the traffic delivered to AT&T Texas. As AT&T witness Constable testified:

To make effective use of these services, end users must be able to determine that they have a message waiting. This is accomplished by the use of a Message Waiting Indicator (“MWI”) which typically takes two forms; a lit lamp on a desk phone, or via a stutter dial-tone that the end user hears when they pick up the phone. MWI is transmitted from the voice mail platform to the terminating party’s end office switch through Simplified Message Desk Interface (“SMDI”) links. I checked AT&T Texas’ records to verify if any of UTEX’s customers have purchased SMDI links from AT&T Texas and they have not. As a result, any such voice mail messages that UTEX were to transmit to AT&T Texas would be without the benefit of a notification to those end users that they have a pending message. Further, none of UTEX’s customers claim that they offer telemessaging services on their websites.⁸⁹

UTEX’s customers also do not qualify as ESPs that provide Internet service. As defined in the ICA, an ISP is “any person or entity that provides the ability for end users to access the features, functions and information available over the Internet (internet access) using the public switched telephone network.”⁹⁰ In other words, UTEX’s customer would have to be a company like AOL, which enables its customers to access the Internet over the PSTN.⁹¹ UTEX has provided no evidence that its customers provide this service. To the extent UTEX contends that its customers deliver VoIP traffic – and UTEX admits that it has no way of knowing whether any particular traffic it delivers *is* VoIP⁹² – VoIP service provides none of those things. VoIP

⁸⁸ *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002) (“To determine the parties’ intent, courts must examine the entire agreement when interpreting a contract and give effect to all the contract’s provisions so that none are rendered meaningless.”)

⁸⁹ AT&T Texas Ex. 27 (Constable Reb.) at 14.

⁹⁰ Joint Ex. 38A, GTC, § 53.9.

⁹¹ AT&T Texas Ex. 27 (Constable Reb.) at 13.

⁹² Tr. at 291, ll. 13-19; UTEX Exh. A (Telfer Dir.) at 65, ll. 18-19 (“UTEX cannot on its own determine if a particular call originated from its customers originated on the PSTN.”). *See also* Tr. at 88, ll. 10-17 (Mr. Feldman responding to Staff question regarding whether there are “dedicated facilities from the East Coast or will that – will the packets all go in the public Internet to reach your customer’s router here in Austin,” by stating, “Okay. I don’t know about my customers specifically. Okay? So each of my customers designs their networks however they wish.”)

(Footnote Continued On Next Page)

Providers are not Internet Service Providers because 1) some VoIP Providers do not use the Internet at all; and 2) Internet-based VoIP services do not provide access to the Internet but, instead, merely use the functionality of the Internet once end users have already accessed the Internet.⁹³

UTEX cannot credibly claim that Internet access is synonymous with VoIP technology and, as such, should be included as an ESP under the ICA. VoIP technology was present at the time the original ICA was created in 1998, and the differences between VoIP and Internet access were well known. In a 1998 Report to Congress, commonly known as the Stevens Report, the FCC discussed the various forms of “‘phone-to-phone’ IP telephony” and considerations regarding its regulatory status.⁹⁴ In the Stevens Report, the FCC recognizes the obvious difference between Internet service providers, which “combine processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and service” and IP telephony, which provides “phone-to-phone” services.⁹⁵ The FCC also recognized in that report that “many of the networks connect to the Internet are “intranets,” or private data networks that offer better performance or security to a limited set of users, but can still communicate with the Internet using IP.”⁹⁶

UTEX also cannot credibly argue that VoIP should be considered an evolutionary concept properly incorporated into the ICA because it did not exist when the ESP language was negotiated. As the Stevens Report confirms, VoIP was well known at the time this ICA was first created. Moreover, as previously discussed, contract terms do not evolve over time; they are established as of the date of execution of the contract.⁹⁷

In short, UTEX’s attempt to characterize anything involving Internet Protocol as constituting an ISP is simply incorrect. If UTEX wanted VoIP to be included as an ESP under the ICA, it should have negotiated inclusion of VoIP or IP telephony as part of the definition of

The customers also have interconnected with me differently, and still do. Some have multiple types of ways that they physically interconnect as well over time”).

⁹³ AT&T Ex. 27, (Constable Reb.) at 13, ll. 12-16.

⁹⁴ *In Re Federal-State Joint Board on Universal Service*, Report to Congress, 1998 WL 166178, 13 FCC Rcd. 11,501, 11,830 at ¶¶ 3, 14, 52, 63 (Apr. 10, 1998).

⁹⁵ *Id.* at ¶ 63.

⁹⁶ *Id.*

⁹⁷ *KMI Continental Offshore Prod. Co.*, 746 S.W.2d at 241.

“enhanced service” in § 53.6 of the GTC. It did not, and it should not be permitted to add VoIP now.

3. If UTEX or its customers provide any enhancements, they are neither perceptible to nor requested by either the calling or called parties.

Should the Commission determine that UTEX is not required to establish that its customers provide voice mail, tele-messaging, or Internet access but can satisfy § 1.4.1 merely by showing that its customers provide some form of enhanced services, the Commission should still reject UTEX’s claim for at least two reasons.

The first reason to reject this claim is that any so-called enhancements are invisible to the calling and called parties. UTEX witness Soren Telfer testified that any changes either UTEX or its customers might make to this traffic “would be undetectable to the PSTN users by and large if the network is operating correctly.”⁹⁸ Thus, these calls undergo no net protocol conversion and provide no enhanced service functionality to end users due to any use of IP technology and would be considered telecommunications rather than information services by the FCC.⁹⁹ From the calling and called parties’ perspectives, these are nothing but ordinary phone calls.

UTEX’s claim that some sort of undetectable enhancement such as the creation of white noise “can happen to the media of the call”¹⁰⁰ provides no basis for finding that these calls are enhanced, much less that these calls are “received from” ESPs. In the first instance, enhancements like white noise are not voice mail, Internet service, or tele-messaging. In the second instance, as UTEX admits, these “enhancements” are not perceptible to the calling or called parties. Moreover, they have nothing to do with any choices made by the party originating the call. As Mr. Telfer conceded in responding to clarifying questions from Commission Staff, whether the user is cognizant or not of the enhancement is irrelevant for purposes of UTEX’s claim that these services are enhanced.¹⁰¹ If these enhancements are not generated by or on behalf of the calling or called parties, they should not form a basis for finding that these calls are to or from ESPs. As the FCC noted in the *ISP Remand Order*, “The proper focus for identifying a communication needs to be the user interacting with a desired webpage, friend, game, or chat

⁹⁸ Hearing Tr. at 307, ll. 1-3.

⁹⁹ *IP-In-The-Middle Order*, ¶1.

¹⁰⁰ Hearing Tr. at 369, ll. 14-16.

¹⁰¹ Hearing Tr. at 371, l. 20 – 373, l. 5 (e.g., “I don’t know that I can say that user knowledge or user choice is really a part of the technical determination of [whether a call is or is not enhanced]”).

room, not on the increasingly mystifying technical and mechanical activity in the middle that makes the communication possible.”¹⁰²

In its ruling on legacy AT&T’s advanced prepaid calling card services, the FCC rejected a similar argument that prepaid calling card services should be treated as “enhanced” services. Legacy AT&T argued that because it provided an advertising message in conjunction with calls made using the calling card, its calls were providing information services and were necessarily interstate. Holding that this advertising “enhancement” did not transform the calling card’s service – *i.e.*, the placing of long-distance calls – into either an information or an interstate service, the FCC reasoned:

Because the advertising message is provided automatically, without the advance knowledge or consent of the customer, there is no “offer” to the customer of anything other than telephone service, nor is the customer provided with the “capability” to do anything other than make a telephone call.

* * * * *

We find that the advertising message provided to the calling party in this case is incidental to the underlying service offered to the cardholder and does not in any way alter the fundamental character of that telecommunications service. From the customer’s perspective, the advertising message is merely a necessary precondition to placing a telephone call and therefore the service should be classified as a telecommunications service.¹⁰³

In the same way, the “white noise” and other possible enhancements that UTEX or its customers may provide offer nothing to the calling or the called parties and, as such, provide no basis for finding that these calls are somehow “enhanced” and thereby exempt from access charges.

The second reason to reject this argument is that, as AT&T witness Constable testified, UTEX’s three main customers do not provide enhanced services at all but, instead, function as a carrier’s carrier to assist IXCs in avoiding access charges:

UTEX has three main customers: * * * * *. These companies do not offer enhanced services to end users. Rather, each of them functions as a carrier’s carrier in assisting IXCs to avoid access charges. This “call laundering” business is known in the industry as Least Cost Routing (“LCR”)

¹⁰² *In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (“ISP Remand Order”), 2001 WL 455869, 16 FCC Rcd. 9151 at ¶ 59 (April 27, 2001).

¹⁰³ *In Re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 2005 WL 433235, 20 FCC Rcd. 4826 ¶¶ 15, 16 (Feb. 23, 2005), *pet. for review denied*, 454 F.3d 329 (D.C. Cir. 2006) (emphasis added).

***** own website describes ***** as a “carrier’s carrier.”¹⁰⁴ Its website further boasts that it “is trusted by more than 120 other telecom carriers to terminate and originate billions of minutes annually,”¹⁰⁵ and even goes so far as to describe the PSTN-IP-PSTN services that it offers.¹⁰⁶ ***** additionally touts its telecommunications prowess by bragging that it has “over 250 years of combined experience in telecommunications” (emphasis added).¹⁰⁷ ***** , which is now in bankruptcy, gained notoriety in 2003 as one of the carriers MCI used when it was being sued for \$11 billion in fraud. ***** was accused of assisting MCI in access avoidance by manipulating the CPN. Interestingly, MCI’s own end users complained about the arrangement because the CPN manipulation used to help the companies avoid access charges interfered with the operation of Caller ID services.¹⁰⁸ In fact, in comments relating to intercarrier compensation dockets at the FCC, ***** stated—a statement UTEX later quoted¹⁰⁹—that ***** carries traffic that originates both on the PSTN and on IP networks and that it cannot distinguish or separate the two. If that is the case, I find it hard to believe that ***** can affirm to UTEX that all of its traffic is enhanced.¹¹⁰

The representations of UTEX customers are further corroborated by studies AT&T Texas made of traffic originating from AT&T’s customers as PSTN on Feature Group D trunks (*i.e.*, long distance trunks) and terminating through UTEX local interconnection trunks.¹¹¹ There is no question that UTEX is routing IXC traffic. These studies also showed instances of CPN stripping: calls were originated, *with CPN*, by AT&T end users in one LATA, and subsequently delivered by UTEX, *with no CPN*, to AT&T Texas for termination in another LATA.¹¹²

¹⁰⁴ ***** (part of quote from Constable Dir.)

¹⁰⁵ ***** (part of quote from Constable Dir.)

¹⁰⁶ *****

***** (part of quote from Constable Dir.)

¹⁰⁷ ***** (part of quote from Constable Dir.)

¹⁰⁸ ***** (part of quote from Constable Dir.)

¹⁰⁹ ***** (part of quote from Constable Dir.)

¹¹⁰ AT&T Ex. 18 (Constable Dir.) at 10, l. 21 – 12, l. 5.

¹¹¹ AT&T Ex. 17 (Cole Dir.) at 12, ll. 4-8. *See also* Tr. at 683, ll. 1-21.

¹¹² *Id.* at 12, ll. 9-14.

D. The jurisdictional characteristics of a PSTN originated or terminated call that has been partially routed through the Internet are consistent with AT&T's Interpretation of the ICA.

In Order No. 50 the Arbitrators requested briefing regarding the jurisdictional characteristics of a PSTN originated or terminated call that has been partially routed through the Internet. The answer to compensation issues under the ICA should be ascertained, first and foremost, in the context of the ICA, which governs the compensability of traffic exchanged between UTEX and AT&T Texas. The ICA is technology neutral and sets compensation without regard to whether a call has been partially routed using Internet Protocol. Instead, as discussed above, the ICA determines whether calls are Local, interstate, intrastate, intraLATA, or interLATA on the basis of the NPA-NXX's associated with the calling and called parties. While there may be instances when an NPA (area code) does not accurately reflect the geographical location of the calling or called party – such as when a call from a cell phone with a 512 Austin area code is placed from downtown Dallas – the parties to the ICA agreed that NPA-NXX's constitute the proper, controlling mechanism for determining the jurisdiction of a call for purposes of compensation.

While the ICA rather than FCC decisions should be considered controlling, FCC decisions are consistent with the compensation provisions of the ICA. First, as previously noted, the FCC held in its *IP-In-The-Middle Order* that any call originated and terminated on the PSTN is telecommunications traffic regardless of any utilization of IP transport for a portion of the call.¹¹³ This means that such traffic is subject to traditional jurisdictionalization of traffic such as that imposed by the ICA. In other words, such traffic is not “inherently” either local or non-local, but is instead determined to be local or non-local by a comparison of the area codes for the calling and called parties.

Second, the FCC has generally imposed an end-to-end analysis of telecommunications traffic for purposes of determining whether a call is local or non-local. In other words, it is the jurisdictional location of the calling and called parties that determines whether a call is local or non-local. Whether a carrier routes a call to a particular jurisdiction prior to terminating it or an

¹¹³ “We find AT&T's specific service, which an end-user customer originates by placing a call using a traditional touch-tone telephone with 1+ dialing, utilizes AT&T's Internet backbone for IP transport, and is converted back from IP format before being terminated at a LEC switch, is a telecommunications service and is subject to section 69.5(b) of the Commission's rules.” *IP-In-The-Middle Order* at ¶ 24.

ESP provides some sort of enhancement is irrelevant. Jurisdiction is based “on the endpoints, not the actual path, of each complete communication.”¹¹⁴ For example, “a debit card call that originates and ends in the same state is an intrastate call, even if it is processed through an 800 switch located in another state.”¹¹⁵

Under the FCC’s traditional end-to-end analysis, the questionable claim that UTEX or its customers provide some sort of “enhancement” in the middle of the traffic delivered to AT&T Texas is immaterial. “[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications.”¹¹⁶

The FCC’s reasoning in its *Enhanced Prepaid Calling Card Services Order* illustrates why UTEX’s claims of enhancements fail to provide any basis for exempting this traffic from access charges. In rejecting the notion that what happens to a call after it is initiated by the calling party but before it is terminated can in any way change the jurisdiction of a call, the FCC reasoned:

We are not persuaded by AT&T’s claim that inserting advertisements in a calling card service transforms that service into an information service under the Act and our rules. As an initial matter, we find that AT&T’s service does not meet the statutory definition of an information service because AT&T is not “offering” any “capability” with respect to the advertising message. . . . Because the advertising message is provided automatically, without the advance knowledge or consent of the customer, there is no “offer” to the customer of anything other than telephone service, nor is the customer provided with the “capability” to do anything other than make a telephone call.¹¹⁷

* * * * *

We reject AT&T’s argument that the communication of the advertising message creates a call endpoint at the switching platform, thereby dividing a calling card communication into two calls. . . . Under an end-to-end analysis, communication of the incidental advertising message embedded in the AT&T card here is no more relevant than the typical phrase, “Thank you for using AT&T.”¹¹⁸

A similar analysis and result should be reached here. As UTEX itself admits, the so-called “enhancements” provided are invisible to the calling and called parties. In addition, UTEX treats

¹¹⁴ *In Re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 2005 WL 433235, 20 FCC Rcd 4826 at ¶ 5 (Feb. 23, 2005).

¹¹⁵ *Id.* at ¶ 5, n. 6 (quoting *Time Machine*, 11 FCC Rcd at 1190, para. 29).

¹¹⁶ *Id.* at ¶ 5, n.6 (citing and quoting *Teleconnect Co. v. Bell Tel. Co. of Pennsylvania*, File No. E-88-83, *et al.*, Memorandum Opinion and Order, 10 FCC Rcd 1626, 1629-30, paras. 12-14 (1995)).

¹¹⁷ *Id.* at ¶ 15.

¹¹⁸ *Id.* at ¶¶ 15, 23.

customer knowledge or consent to the enhancements as irrelevant. Finally, the fact that UTEX's customers meet it in a situs that UTEX designates the virtual LATA where the call is terminated forms no basis for dividing these calls into two parts so as to treat UTEX's customers as the originators of the calls.

IV. THE ICA REQUIRES UTEX TO BE RESPONSIBLE FOR ACCESS CHARGES ON INTERLATA CALLS THAT IT DELIVERS TO AT&T TEXAS.

The ICA plainly renders UTEX liable for access charges arising out of interLATA calls that UTEX delivers to AT&T Texas. Section 6.1 of Attachment 12 provides: "For interLATA traffic and intraLATA traffic, compensation for termination of intercompany traffic will be at access rates as set forth in each Party's own applicable interstate or intrastate access tariffs." Sections 1.3¹¹⁹ and 2.1.1¹²⁰ of Attachment 11: Network Interconnection Architecture expressly authorize UTEX to route Local, intraLATA and interLATA traffic over the same facilities. The Appendix Interconnection Trunking Requirements ("ITR") to that Attachment contains a similar authorization in § 1.4.¹²¹ Section 1.3 of Attachment 11 and § 1.4 of the ITR Appendix, however, both make plain that the grouping of such traffic does not free UTEX from the responsibility to pay access charges for the long-distance traffic delivered over a local interconnection trunk. Thus, these provisions state that grouping of traffic is allowed "provided such combination of traffic is not for the purpose of avoiding access charges." Section 1.3 further confirms that compensation for long-distance traffic is required by giving the parties the option, when they send long distance traffic over local trunks, either to "provide a percentage of jurisdictional use factors or an actual measurement of jurisdictional traffic." AT&T has opted for actual measurement of the traffic, has used its own measurements of that traffic, and has billed UTEX accordingly.

¹¹⁹ See Joint Ex. 38A, § 1.3 (stating in pertinent part: "SWBT will allow CLEC to use the same physical facilities (e.g., dedicated transport access facilities, dedicated transport UNE facilities) to provision trunk groups that carry Local, intraLATA and interLATA traffic, *provided such combination of traffic is not for the purpose of avoiding access charges.* . . . When traffic is not segregated according to traffic type the Parties will provide a percentage of jurisdictional use factors or an actual measurement of jurisdictional traffic.") (Emphasis added.).

¹²⁰ *Id.* § 2.1.1 (stating in pertinent part: "CLEC Originating (CLEC to SWBT): Subject to Section 1.0 above, interLATA toll traffic and intraLATA toll traffic may be combined with local traffic on the same trunk group when CLEC routes traffic to either a SWBT access tandem which serves as a combined local and toll tandem or directly to a SWBT end office.").

¹²¹ *Id.* § 1.4 (stating in pertinent part: "SWBT will allow CLEC to use the same physical facilities (e.g., dedicated transport access facilities, dedicated transport UNE facilities) to provision trunk groups that carry Local, intraLATA and interLATA traffic, *provided such combination of traffic is not for the purpose of avoiding access charges.*") (Emphasis added.).

UTEX has argued that the FCC's IP-In-The-Middle Order prohibits making UTEX responsible for interLATA access charges. UTEX is mistaken. The FCC was clear in its Order that access charges apply to traffic originated in TDM format on the PSTN, routed in part over the Internet or in IP format, and terminated on the PSTN. The FCC was also clear that avoidance of those access charges could not be accomplished by having multiple service providers involved in the IP transport:

We note that all telecommunications services are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. *Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.* Thus our ruling here should not place AT&T at a competitive disadvantage. We are adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers may be paying access charges for these services while others are not.¹²²

UTEX argues that this provision permits AT&T Texas only to collect access charges from interexchange carriers. In footnote 80 of its Order, however, the FCC expressly rejected such a notion and, instead, recognized that other carriers may, in fact, function as IXC's and, as such, could be liable for the charges: "Depending on the nature of the traffic, carriers such as commercial mobile radio service ("CMRS") providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of this rule."

UTEX's reliance on the FCC's comments in its footnote 92 is also misplaced. There, the FCC noted that "[t]o the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, *unless the terms of any relevant contracts or tariffs provide otherwise.*"¹²³ (Emphasis added.) The ICA does "provide otherwise." There are no terms of the ICA that would direct AT&T Texas to bill only the traditional IXC for interexchange traffic UTEX delivers to AT&T Texas over local interconnection trunks. Footnote 92 must be read in conjunction with footnote 80. The underlying premise in footnote 80 is that, depending on the nature of the traffic, many different types of carriers "may qualify as

¹²² *IP-In-The-Middle Order* at ¶ 19 (Notes 80, 81, and 82 omitted.) (Emphasis added.).

¹²³ *Id.* at ¶ 23, n.92.

interexchange carriers” for purposes of imposing access charges. Moreover, AT&T Texas cannot bill IXC’s unless and until UTEX provides Access Usage Records (“AURs”) that would enable AT&T Texas to do so. In routing this traffic to AT&T Texas, UTEX qualifies, for intercarrier compensation purposes, as an IXC and, as long as it continues route traffic in this manner, it remains responsible for the access charges arising from AT&T Texas’ termination of the calls.

UTEX should have the capability to provide AURs to AT&T Texas. Pursuant to § 7.2.1. of Attachment 12, each Party is required to “record its originating minutes of use including identification of the originating and terminating NXX for all intercompany calls.” Thus, utilizing its own data created pursuant to § 7.2.1, UTEX should be able to generate and provide AURs to AT&T Texas that would allow AT&T Texas to bill the upstream company.¹²⁴ If UTEX does not want to provide these AURs, then in order to avoid the charges, it must take steps to limit the number of calls passed without CPN. UTEX has made a conscious business decision to deliver this traffic, and it should pay the charges that result from doing so.

UTEX has also suggested that it is not liable for these interLATA switched access charges because it and AT&T Texas are jointly providing access. Again, UTEX is mistaken. For traffic to be considered jointly provided access, there must be at least two (2) carriers involved in carrying an interexchange call between the end user and the IXC.¹²⁵ In other words, two carriers would “jointly provide” access service to the IXC on behalf of the IXC’s customer (*i.e.*, the end user). UTEX does not provide exchange access because it is not originating or terminating interexchange traffic, but is instead merely delivering such traffic to AT&T Texas. Furthermore, UTEX is delivering interLATA traffic directly from UTEX to AT&T Texas. UTEX does not claim to be delivering traffic on behalf of IXC’s. Also, jointly provided access is subject to the Meet Point Billing (“MPB”) provisions of the ICA. Under § 2.2 of Attachment 11, UTEX must establish and use a separate trunk group dedicated to MPB traffic.¹²⁶ The traffic at issue here was delivered to AT&T Texas over UTEX’s local interconnection trunks. Finally, the

¹²⁴ AT&T Texas Ex. 17 (Cole Dir.) at 19, ll. 18-21.

¹²⁵ AT&T Texas Ex. 23 (Pellerin Dir.) at 35, ll. 13-15.

¹²⁶ This requirement is consistent with industry practice. *See, e.g., In Re Access Charge Reform*, Eighth Report and Order, 2004 WL 1103977, 19 FCC Rcd., 9108 at ¶ 16 (observing that CLECs may be entitled to collect access charges “even when they do not serve the end-user, if they enter into a joint billing arrangement with the carrier that does serve the end-user” and noting that “there are situations where a competitive LEC may bill an IXC on behalf of itself and another carrier for jointly provided access services pursuant to meet point billing methods”).

parties have not engaged in the joint planning and data exchange required to jointly bill an IXC for this traffic required by Attachment 12, §§ 6.2, 6.4.¹²⁷

V. THERE ARE NO STATUTORY RESTRICTIONS ON ENFORCING THE ICA'S REQUIREMENTS THAT UTEX PAY ACCESS CHARGES.

In proposing DPLs 43, 44, 45, UTEX has suggested that various provisions in the FTA and PURA would prohibit AT&T Texas from enforcing UTEX's ICA obligations to pay access charges. UTEX is wrong. AT&T Texas and UTEX entered into a binding agreement under 47 U.S.C. § 251, one approved by this Commission when UTEX adopted it some seven years ago. Pursuant to 47 U.S.C. § 252(e)(2), the Commission could have rejected this agreement only if it found that (1) the agreement discriminated against a telecommunications carrier not a party to the agreement or (2) implementation of the agreement was not consistent with the public interest, convenience, and necessity. More important, the Commission did *not* reject this ICA but instead approved it, eliminating any basis for challenge to its terms. As a result, UTEX cannot, as it erroneously suggests, have a dispute regarding 47 U.S.C. §§ 253 (regarding removal of barriers to entry), 257 (regarding market entry barriers) and/or 157 (regarding new technologies and services). UTEX also cannot rely on PURA §§ 52.108(3), 55.003(c), 55.005 and 55.006 (provisions proscribing, among other things, preferential or discriminatory practices) to avoid its contractual obligations. Moreover, UTEX has not raised allegations in its pleadings or otherwise that would even suggest these statutes have any relevance to this proceeding.

VI. AT&T TEXAS HAS ACTED IN GOOD FAITH IN ITS DEALINGS WITH UTEX.

UTEX's claims that AT&T Texas has acted in bad faith are meritless and should be rejected. AT&T Texas has consistently cooperated with UTEX and accommodated UTEX's requests for informal dispute resolution.¹²⁸ The main thrust of UTEX's "bad faith" claim is that AT&T Texas has not agreed with UTEX's interpretation of the ICA. UTEX's principal witness on AT&T Texas' alleged bad faith is Lowell Feldman. While Mr. Feldman repeatedly characterizes AT&T Texas as acting in bad faith, the substance of Mr. Feldman's complaints largely boil down to the claim that AT&T Texas is acting in bad faith every time it does not agree with Mr. Feldman.¹²⁹

¹²⁷ AT&T Ex. 23, (Pellerin Dir.) at 36, l. – 38, l. 20.

¹²⁸ See Josephson Direct at 3, l. 25 – 5, l. 23.

¹²⁹ See UTEX Ex. C (Feldman Dir.) at 2-5, 7, 9, 15, 60, 78, 105 (asserting claims of bad faith arising out of disagreement over the meaning of the ICA)..

Disagreement over contract terms is not bad faith. BLACK'S LAW DICTIONARY (2000 ed.) defines "bad faith" as "[d]ishonesty of belief or purpose." AT&T Texas is not only honest in its belief about the proper interpretation of the ICA; it is correct. As such, there cannot be even an issue of bad faith regarding AT&T Texas' claims regarding its rights under the ICA.¹³⁰ In any event, AT&T Texas has not acted in bad faith by trying to recover access charges from UTEX pursuant to the terms and conditions of the ICA. The arguments and authorities presented herein plainly establish that AT&T Texas has, at a minimum, a strong, good faith argument in support of its position.

In the DPLs, UTEX raises numerous specific claims of breach of good faith to which it gave scant attention in its testimony. AT&T responds to each of these issues in the Table provided at the end of this brief.

VII. AT&T TEXAS HAS ACTED IN GOOD FAITH IN ITS DEALINGS WITH UTEX OVER BILLING ISSUES.

The evidence leaves no doubt that AT&T Texas has acted in good faith in addressing billing issues arising out of the rating of traffic delivered to UTEX. AT&T Texas began conducting studies in 2004 to determine the jurisdiction of traffic that AT&T Texas was receiving from and terminating for CLECs in Texas and other states.¹³¹ During the course of those studies, AT&T Texas became aware that certain calls originating over Feature Group D trunks (i.e., long distance trunks) were being terminated over local interconnection trunks, which are ordinarily used for the termination of local traffic.¹³² AT&T Texas also learned during those studies that well over 10% of the UTEX traffic that AT&T Texas was terminating or transiting to other terminating LECs had no CPN.¹³³

On April 11, 2005, AT&T Texas contacted UTEX and explained that AT&T Texas' data showed that AT&T Texas was providing originating switched access service to its end users when they made 1+ dialed interexchange calls, and that the terminating end of those calls was originating over UTEX's local interconnection trunks.¹³⁴ On that date or soon thereafter, AT&T

¹³⁰ See *Lundstrom v. United Services Auto. Ass'n*, 192 S.W.3d 78, 97 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (holding that "there can be no claim for bad faith when an insurer has denied a claim that is, in fact, not covered and has not otherwise breached the contract").

¹³¹ AT&T Texas Ex. 17 (Cole Dir.) at 11:20 to 12:1.

¹³² *Id.* at 12:4-8.

¹³³ *Id.* at 13:3-5.

¹³⁴ *Id.* at 12:17-20.

Texas also discussed the no-CPN issue with UTEX. In the ensuing weeks, AT&T Texas began trading information with UTEX in an effort to understand and resolve the problem.¹³⁵

In July 2005, AT&T Texas sent UTEX a formal notice about the billing issues and advised that AT&T Texas would begin billing UTEX for the no-CPN traffic.¹³⁶ In response, UTEX requested every SS7 record and switch recording that would substantiate the bills.¹³⁷ Because UTEX's traffic volumes were fairly consistent over the period in question, AT&T Texas offered to provide a representative day or week.¹³⁸ When AT&T Texas and UTEX came to an impasse on the amount of data to be provided, they agreed to conduct a joint test on August 30, 2005. That test did not resolve the issue.

Thereafter, over the course of many months, various AT&T employees attempted to work with UTEX to address UTEX's failure to pass CPN on calls being delivered into the AT&T Texas network and to address UTEX's improper routing of calls.¹³⁹ Those efforts included joint testing, the provision of records and record descriptions by AT&T Texas to UTEX, and numerous communications to UTEX.¹⁴⁰ When AT&T Texas discovered that two of its switches were not recording properly, it promptly corrected the associated no-CPN billing and gave UTEX the benefit of the error by assuming that 100% of the traffic on those two trunk groups had 100% CPN, which gave UTEX a credit for the period of the malfunction.¹⁴¹ Thus, AT&T Texas made numerous efforts to work cooperatively with UTEX, and UTEX's suggestion to the contrary is wrong.

AT&T Texas also responded, both formally and informally, to UTEX's request for an audit of AT&T Texas' billing system. In a teleconference on May 8, 2007 and in letters dated May 22, 2007 and May 31, 2007, AT&T Texas repeatedly asked UTEX to identify the scope of the audit that UTEX was seeking. On June 7, 2007, AT&T Account Executive Pamela Miller sent a letter to Mr. Feldman again asking UTEX to specify the scope of the audit in greater detail and reminding UTEX that it was responsible for the cost of the audit under the ICA.¹⁴² UTEX

¹³⁵ See UTEX Ex. 432; UTEX Ex. 439; UTEX Ex. 440; UTEX Ex. 444; UTEX Ex. 454; UTEX Ex. 478

¹³⁶ AT&T Texas Ex. 17 (Cole Dir.) at 13:24 to 14:2.

¹³⁷ *Id.* at 14:6-7.

¹³⁸ *Id.* at 14:7-12.

¹³⁹ AT&T Texas Ex. 17 (Cole Dir.) at 16:5-8.

¹⁴⁰ *Id.* at 16:8-10.

¹⁴¹ *Id.* at 14:24 to 15:8; AT&T Texas Ex. 26 at 7:5-5-18.

¹⁴² AT&T Texas Ex. 28 (Dignan Reb.) at 15:4-10; *see also id.* Att. RAD-4.

never responded with a specific scope of audit, nor did it submit any payment for an audit.¹⁴³ Instead, the audit issue simply vanished, only to re-emerge in this arbitration as an accusation of bad faith.

UTEX further errs by arguing that AT&T Texas failed to act in good faith because an AT&T Texas employee named Tony Jackson agreed in November 2004 that certain charges disputed by UTEX were not proper under the ICA.¹⁴⁴ Those disputed charges were for local calls, not for charges attributable to the no-CPN traffic or the routing of interexchange traffic over local trunks. Indeed, AT&T Texas did not even discover that UTEX was routing interexchange traffic over local trunks and delivering less than 90% CPN until April 2005,¹⁴⁵ and AT&T Texas did not send a bill for the charges attributable to no-CPN and interexchange traffic over local trunks until July 2005. As AT&T Texas noted in its testimony, Mr. Jackson could not and did not agree in November 2004 that UTEX was correct in a dispute that did not exist until several months later.¹⁴⁶ Thus, contrary to UTEX's arguments, there is no basis for the Arbitrators to infer that AT&T Texas refused to honor Mr. Jackson's word or otherwise acted in bad faith.

For these reasons, UTEX's arguments that AT&T Texas failed to notify UTEX about the no-CPN traffic and to work cooperatively and in good faith with UTEX have no merit.

VIII. UTEX IS LIABLE FOR AT&T TEXAS' BILLINGS INTEREXCHANGE TRAFFIC OVER LOCAL TRUNKS.

As previously discussed, UTEX is required to pay the access charges on interexchange traffic routed over local trunks unless it provides AT&T Texas with the data to allow AT&T Texas to bill the IXC's who are routing interexchange traffic over local trunks. In particular, UTEX can provide AT&T Texas with AURS containing Carrier Identification Code ("CIC") or Operating Company Numbers ("OCNs") of the upstream IXC's routing the interexchange traffic over local trunks, and AT&T Texas will use those AURs to bill the upstream IXC's.¹⁴⁷ But even though UTEX first established interconnection trunks with AT&T Texas in mid-2004, UTEX has never set up the record exchange process that would allow the exchange of AURs with AT&T Texas.¹⁴⁸ The reason, of course, is that UTEX knows the purpose of the AUR exchange

¹⁴³ AT&T Texas Ex. 28 (Dignan Reb.) at 15:10-12.

¹⁴⁴ UTEX Ex. B (Lewis Dir.) at 19:4-10.

¹⁴⁵ AT&T Texas Ex. 28 (Dignan Reb.) at 18:1-3.

¹⁴⁶ AT&T Texas Ex. 28 (Dignan Reb.) at 18:3-5.

¹⁴⁷ AT&T Texas Ex. 17 (Cole Dir.) at 30:16-20.

¹⁴⁸ *Id.* at 30:23-24.

process – to bill the third party providers identified by UTEX. Because UTEX has chosen not to reveal the identities of those third-party providers, it is appropriate that UTEX be required to pay the access charges.

IX. UTEX IS NOT EXCUSED FROM LIABILITY FOR ACCESS CHARGES BECAUSE AT&T TEXAS HAS BILLED UTEX ON THE BASIS OF TERMINATING RATHER THAN ORIGINATING RECORDS.

AT&T Texas used terminating switch recordings called Automatic Message Accounting (“AMA”) records to quantify the no-CPN percentages and the amount of interexchange traffic that UTEX terminated over local trunks.¹⁴⁹ UTEX argues that the ICA requires AT&T Texas to bill UTEX based on originating records, not terminating records, and therefore AT&T Texas is prohibited from recovering the amounts owed by UTEX.¹⁵⁰ That argument fails for several reasons.

First, in response to CLEC complaints about the use of originating records, the Commission issued an arbitration award in Docket No. 21982 that ordered AT&T Texas to move away from originating records and to begin using terminating records for billing CLECs.¹⁵¹ AT&T Texas cannot be penalized in this proceeding for complying with the Commission's order in Docket No. 21982.

Second, UTEX is required to provide AT&T Texas with originating records under the ICA, and UTEX has breached the ICA by refusing to do so. After the Commission's order in Docket No. 21982, AT&T Texas sent a letter to all Texas CLECs that had interconnection agreements with AT&T Texas informing those CLECs that AT&T Texas intended to begin billing from terminating recordings if the CLECs did not provide originating records.¹⁵² Even though UTEX was one of the recipients of the letter, it never provided AT&T Texas with any originating records.¹⁵³ Thus, UTEX had an explicit request from AT&T Texas to provide originating records, and UTEX refused to do so, in violation of the ICA. UTEX cannot commit a breach that renders AT&T Texas' performance impossible and then prevail on the argument that

¹⁴⁹ AT&T Texas Ex. 22 (Layman Dir.) at 12:15-18.

¹⁵⁰ UTEX Ex. B (Lewis Dir.) at 5:7-13; UTEX Ex. C (Feldman Dir.) at 140:1-5.

¹⁵¹ AT&T Texas Ex. 22 (Layman Dir.) at 14:6-11.

¹⁵² *Id.* at 15:7-13. A copy of the letter sent to CLECs such as UTEX is attached to Mr. Layman's Direct Testimony as Attachment LDL-6.

¹⁵³ *Id.* at 15:14-19.

AT&T Texas did not perform as required under the ICA.¹⁵⁴ To the contrary, a condition is considered fulfilled when the breaching party prevents the non-breaching party from fulfilling that condition.¹⁵⁵ Thus, to the extent AT&T Texas was required to bill based on originating records, it is deemed to have done so as a matter of law.

UTEX apparently argues that it was not obligated to provide originating records to AT&T Texas under the ICA because UTEX claims it did not owe any money to AT&T Texas.¹⁵⁶ But, of course, UTEX's argument is completely circular – that is, UTEX claims that (1) it was not required to pay AT&T Texas anything because AT&T Texas did not use UTEX's originating records, and (2) UTEX did not provide its originating records because it was not required to pay AT&T Texas anything. In fact, UTEX *was* required to pay amounts to AT&T Texas, and so UTEX was required to provide originating records. UTEX cannot be allowed to profit from its own breach of the ICA.

Finally, whether AT&T Texas billed based on originating or terminating records is ultimately irrelevant. UTEX was required by the ICA to provide originating records to AT&T Texas, and UTEX failed to do so. AT&T Texas is entitled to damages for UTEX's failure to comply with that contractual obligation, and the amount of damages would be established by the losses that AT&T Texas suffered as a result of UTEX's failure to comply. AT&T Texas has been able to quantify those losses because it has terminating records that duplicate the originating records in pertinent part. "Therefore, at the end of the day, it makes no difference whether the records are originating or terminating."¹⁵⁷ AT&T Texas could maintain the same action for the same damages based on UTEX's failure to provide originating records. UTEX's "originating records" argument is simply another red herring.

¹⁵⁴ See, e.g., *S.K.Y. Inv. Corp. v. H.E. Butt Grocery Co.*, 440 S.W.2d 885, 889-90 (Tex. Civ. App.—Corpus Christi 1969, no writ) ("When one party to a contract, by wrongful means, prevents the other party from performing, as by making it impossible for him to perform, such an action by the party at fault constitutes a breach of contract. The effect of such a breach is not only to excuse performance by the injured party, but also to entitle him to recover for any damage he may sustain by reason of the breach.").

¹⁵⁵ See *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) ("When the obligation of a party to a contract depends upon a certain condition's being performed, and the fulfillment of the condition is prevented by the act of the other party, the condition is considered fulfilled.").

¹⁵⁶ See Tr. 753:25 – 754:1-2 (Richard Lewis testifying, "We do not believe that we owe you any money; so there was no reason to send you originating records.").

¹⁵⁷ AT&T Texas Ex. 31 (Layman Reb.) at 15:11-12.

X. AT&T TEXAS HAS PROVIDED SUFFICIENT CALL DETAIL TO VERIFY THE AMOUNTS OWED BY UTEX.

DPL No. 88, which was submitted by UTEX, asks whether AT&T Texas has provided sufficient call detail to quantify any amounts that may be owed. Of course, UTEX claims that it owes nothing to AT&T Texas because all of the traffic UTEX delivers to AT&T Texas is supposedly to or from enhanced service providers. Therefore, it is unclear why UTEX believes it needs to receive any call detail records (“CDR”) from AT&T Texas.

In any event, AT&T Texas provided a substantial amount of call detail in response to UTEX's formal discovery requests and its informal requests for information to substantiate the invoices. In addition to providing UTEX with CDR in April 2006 as part of an effort to resolve matters without litigation, AT&T Texas produced as part of the discovery in this case three separate USB port drives containing the following CDR:

- monthly AMA datasets for July 2004 through August 2007;
- monthly Category 92 summary datasets for August 2006 and September 2006;
- monthly Category 92 Terminating Call Detail datasets for August 2006 and September 2006, and July 2007 and August 2007;
- monthly Category 92 Originating Call Detail datasets for August 2006 and September 2006, and July 2007 and August 2007; and
- daily SS7 CDR datasets from July 2006, August 2006, September 2006, November 2006, and January 2007 through August 2007.¹⁵⁸

The AMA datasets contain the original call detail recordings made by the AT&T Texas switches, and they serve as the primary input upon which the UTEX bill is generated.¹⁵⁹

Through this combination of informal and formal discovery, UTEX has received more than *500 million* CDR from AT&T Texas.¹⁶⁰ If hundreds of millions of CDR with this level of detail are not sufficient for UTEX to reconcile its invoices, it is frankly difficult to imagine what would be sufficient.

Moreover, even if AT&T Texas had not provided UTEX with over 500 million CDR, UTEX has its own CDR that it could use to reconcile the AT&T Texas invoices or to show that

¹⁵⁸ AT&T Texas Ex. 16 (Andrews Dir.) at 3:11 to 4:3.

¹⁵⁹ AT&T Texas Ex. 25 (Andrews Reb.) at 4:8-10.

¹⁶⁰ AT&T Texas Ex. 17 (Cole Dir.) at 25:8-10.

the invoices are inconsistent with the UTEX CDR.¹⁶¹ To AT&T Texas' knowledge, UTEX has never done so, probably because it knows that the invalid CPN percentages in its own CDR are roughly the same as those in AT&T Texas' CDR.¹⁶²

Nor can UTEX credibly claim that it has not had time to perform the reconciliations it purports to need. AT&T Texas first provided the AMA records to UTEX as early as April 2006, and AT&T Texas provided more large batches of records to UTEX in February and September 2007. Despite having one set of AMA records for over 18 months and another set for over nine months, UTEX has never shown that they are inaccurate or unusable in any meaningful way, or that they fail to support the charges in the invoices.

XI. AT&T TEXAS HAS PROPERLY BILLED UTEX WITH UNDERSTANDABLE, ACCURATE INDUSTRY-STANDARD INVOICES AND SHOULD BE AWARDED THE AMOUNTS SOUGHT HEREIN

AT&T Texas has provided timely, complete, understandable and accurate invoices to UTEX. AT&T Texas has also sent UTEX invoices that comply with the ICA and the industry standards for invoices. UTEX's arguments to the contrary are red herrings to deflect attention from UTEX's refusal to pay the amounts it owes and its lack of understanding about standard industry billing practices. That is evidenced by UTEX's refusal to pay amounts that are unrelated to the no-CPN issue or the delivery of interexchange traffic over local trunks.

A. AT&T Texas' invoices are timely, complete, understandable and accurate.

1. AT&T Texas' invoices are readily understandable to anyone who is generally familiar with telecommunications invoices.

AT&T Texas' invoices are created in accordance with industry standards and therefore are comprehensible to anyone who is at all familiar with billing conventions in the telecommunications industry. The bills start at a high level of generality, but the totals in the summary pages are methodically broken down into smaller increments that provide the necessary level of detail UTEX claims it needs. The following explains the progression from the summary pages to the detail.

¹⁶¹ See AT&T Texas Ex. 31 (Layman Reb.) at 18:18-20 (stating that UTEX and other LECs "already have the very records Mr. Lewis mistakenly says should be provided as part of the bill").

¹⁶² AT&T Texas Ex. 26 (Cole Reb.) at 4:3-8; see AT&T Texas Ex. 17 (Cole Dir.) at 20:14-18 ("UTEX has provided AT&T Texas with Call Detail Records (CDRs) for the months of August and September 2006. After matching the CDR CPN data to the LERG, the results are consistent with AT&T Texas' AMA data, and this confirms that UTEX is not passing valid CPN as the ICA requires.").

A monthly invoice from an AT&T Texas Billing Account Number ("BAN") sent to UTEX is roughly 1200 pages. UTEX need not search through all 1200 pages to determine how much it owes, however. The total balance due for that BAN is contained on the first page of the bill, and that first page further breaks down the charges into the past due balance, any late payment charges on the past due balance, and the detail of current charges. An example of such a summary page is attached to this brief at page 1 of Tab E for BAN 5104010223920. That page shows that as of September 2007, UTEX owed a past due balance of *****; it owed late payment charges of *****, and it owed current charges of *. That page also shows that the current charges of ***** are composed of ***** for interstate charges and ***** for intrastate charges.

The end of the bill contains summary pages that subdivide the interstate and intrastate charges into the various rate elements. The interstate charges, for example, are composed of Total Switched/Local Transport Charges and Total End Office Charges. Similarly, the intrastate charges are composed of Total Switched/Local Transport Charges, Total End Office Charges and Total Carrier Common Line Access Charges.

The bills also contain summary pages that provide a more granular level of detail for each of the foregoing rate elements. Pages 12-13 of Tab E, for example, break out the minutes of use ("MOU") and the charges for the different types of Switched/Local Transport Charges, End Office Charges and Carrier Common Line Charges. These pages contain the sums of the MOU and charges by end office for all of the end offices in that BAN.

Most of the remaining pages of the bill are summaries of charges by end office. These are apparently the parts of the bill that UTEX finds incomprehensible and "fairly useless."¹⁶³ In fact, these parts of the bills are readily intelligible and quite useful to anyone truly interested in validating and paying its telecommunications invoices. For each end office, the invoice includes a series of pages with MOU and charges broken out by rate category, but the MOU and charges are then summarized in a "stats" page for interstate usage and a "stats" page for intrastate usage. The interstate stats provide the recorded MOU and number of messages for interstate "toll

¹⁶³ UTEX Ex. B (Lewis Dir.) at 7:7.

terlata" calls, and the intrastate stats provide the MOU and number of messages for intrastate "toll" and "toll terlata" calls.

UTEX complains that the "toll" and "toll terlata" categories are not useful because they cannot be used to determine which calls are no-CPN and which calls are interexchange calls terminating over local trunks. By definition, "toll terlata" (i.e., interLATA) calls originate and terminate in different LATAs, so AT&T Texas has to know the CPN before it can categorize a call as interLATA. Thus, the interstate and intrastate "toll terlata" categories cannot include any no-CPN calls.¹⁶⁴ From there, simple logic compels the conclusion that a no-CPN call must be included in the only other category on the invoices – the intrastate "toll" category. This is reinforced by the contract language that says no-CPN calls will be billed at intrastate "toll" rates. Accordingly, UTEX's claim that the invoices fail to distinguish between no-CPN and interLATA charges either is disingenuous or betrays a profound lack of understanding of the telecommunications industry and the ICA.

It is true that within the intrastate toll category, the bills do not distinguish between no-CPN calls and true intraLATA toll calls. That is because "no-CPN" is not an industry-defined term for use on an invoice.¹⁶⁵ Moreover, carriers generally pass adequate CPN and so there is no need to include a line for no-CPN calls on the invoice.¹⁶⁶ As Mr. Dignan testified, "In that respect, UTEX is very much an outlier, and AT&T Texas has not reformatted its billing system to account for one anomalous company."¹⁶⁷

UTEX, however, has its own call detail records ("CDR"), and therefore it can determine exactly how many of the calls passed to AT&T Texas lack CPN. The remainder of the calls in the intrastate "toll" category are true intraLATA toll calls.¹⁶⁸ And even if UTEX can't identify the no-CPN calls from its own CDR for some reason, it should be able to determine how many of its calls are actual intraLATA toll calls. After all, Mr. Telfer claims UTEX can "parse, process and class one month of AT&T AMA in approximately seven minutes on a desktop computer."¹⁶⁹ A company with that capability can surely write a program to determine which

¹⁶⁴ See AT&T Texas Ex. 31 (Layman Reb.) at 25:7-8 ("If the from and to points are known, those can't be no-CPN calls.").

¹⁶⁵ AT&T Texas Ex. 28 (Dignan Reb.) at 9:16.

¹⁶⁶ *Id.* at 9:17-19.

¹⁶⁷ *Id.* at 9:19-21.

¹⁶⁸ *Id.* at 10:13-17.

¹⁶⁹ UTEX Ex. A (Telfer Dir.) at 13:18-19.

calls within a LATA are subject to tolls and which are not. Once UTEX identifies the actual intraLATA toll calls, the remaining intrastate "toll" charges are for no-CPN calls.

Nor is it difficult to understand where the switched access charges attributable to interexchange traffic over local trunks appear on the bills. If a call terminating over a local trunk is an interexchange call, it is by definition an interLATA call. Therefore, it has to be an interstate or intrastate "toll terlata" call. And while the "toll terlata" categories do not distinguish between interLATA calls terminated over Feature Group D trunks and those terminated over local trunks, UTEX should be able to determine from its own CDR whether a particular call is interLATA and the trunk on which that call terminates. UTEX does not need to have AT&T Texas' AMA data to ascertain those details.

2. UTEX's argument that the AT&T Texas invoices are unintelligible is erroneous.

Despite the fact that the disputed charges on the AT&T Texas invoices are either explicit or can be inferred through simple deduction, UTEX maintains that the invoices are "incomprehensible"¹⁷⁰ and "irreconcilable."¹⁷¹ In fact, the invoices are fully comprehensible and reconcilable, and UTEX's claim to the contrary stems from its own inexperience or its willful misunderstanding.

UTEX's primary complaint appears to be that the invoices contain "no call detail records or other supporting documentation to help reconcile to our records."¹⁷² As explained above, however, UTEX has its own CDR, and that CDR contains CPN. Unless UTEX is changing the CPN in some respect, it is not clear why UTEX needs AT&T Texas' AMA data to reconcile the charges to the CDR. UTEX can test the invoices using its own CDR.

In any event, AT&T Texas has produced hundreds of millions of AMA records to UTEX, both before this case was filed and during the course of discovery in this case.¹⁷³ Yet with all of that data, UTEX still claims to have no clue as to how to reconcile the invoices. That indicates that UTEX's complaint about not receiving CDR from AT&T Texas is simply an excuse to avoid paying the amounts UTEX owes.

¹⁷⁰ UTEX Ex. B (Lewis Dir.) at 6:23.

¹⁷¹ UTEX Ex. G (Lewis Reb.) at 21:10.

¹⁷² UTEX Ex. B (Lewis Dir.) at 7:5.

¹⁷³ AT&T Texas Ex. 31 (Layman Reb.) at 8:23-25.

In fact, the evidence shows that UTEX *does* understand the invoices. UTEX Ex. 19 is an October 2004 letter from Mr. Lewis disputing charges contained in an AT&T Texas invoice. On page 2 of that exhibit, Mr. Lewis did an extremely thorough job of recapping the various sections of the AT&T Texas bill and what they applied to. For example, he clearly understood that certain charges were for traffic originated by UTEX and terminated by AT&T Texas to an AT&T Texas end office. He also understood that some of the charges were attributable to intrastate access and others were for transit by AT&T Texas. As Mr. Layman noted, "It seems odd that Mr. Lewis apparently understood the bill very well in October 2004 (which was the first time he had ever seen this bill), and yet after receiving the same formatted bill for years he is now totally confused about the same issues he understood and outlined in his letter."¹⁷⁴ The inescapable conclusion is that UTEX is now promoting the fiction that the bills are incomprehensible because it seeks an excuse to avoid paying them.

In fact, Mr. Layman explained in his testimony that he can reconcile the UTEX bills, even though he is not a CABS expert. Using only the UTEX bills and some summary pages that UTEX could easily generate if it chose, Mr. Layman reconciled the summary pages of information to the summary pages on the bills.¹⁷⁵ Mr. Layman then reviewed the CDR from a single day, May 30, 2007, and tied those CDR to the UTEX invoices.¹⁷⁶ As Mr. Layman noted, "That shows clearly that the detail records match the summary records and the summary records, as demonstrated earlier, match the bill pages."¹⁷⁷

Finally, if UTEX truly cannot understand the invoices, it has no one to blame but itself. The person that UTEX has assigned to process the invoices,¹⁷⁸ Mr. Lewis, has very little experience with telecommunications invoices. He has been in the telecommunications business for only three years,¹⁷⁹ and he has never attended a class that would help him understand telecommunications invoices.¹⁸⁰ The only training he has received on understanding invoices is what he has learned on the job at UTEX,¹⁸¹ and the only invoice that UTEX receives from an

¹⁷⁴ AT&T Texas Ex. 31 (Layman Reb.) at 19:12-15.

¹⁷⁵ AT&T Texas Ex. 31 (Layman Reb.) at 23:4 to 24:12.

¹⁷⁶ *Id.* at 28:1 to 29:19.

¹⁷⁷ *Id.* at 28:14-15.

¹⁷⁸ UTEX Ex. B (Lewis Dir.) at 2.

¹⁷⁹ Tr. 760:15.

¹⁸⁰ Tr. 761:10.

¹⁸¹ Tr. 760: 24.

interconnected party is the one from AT&T Texas.¹⁸² With such limited experience, it would be reasonable to expect Lewis to seek some training on how to understand the AT&T Texas invoices, but Lewis admitted that he has never participated in AT&T Texas' CLEC Online courses,¹⁸³ and he has never met with AT&T Texas billing specialists to ask about the bills.¹⁸⁴ Nor has he or anyone else at UTEX participated in industry forums to learn about standard industry formats for billing.¹⁸⁵ These facts suggest that UTEX *wants* Mr. Lewis to remain uninformed about telecommunications invoices so that UTEX can claim the invoices are unintelligible and thereby avoid paying the bills it owes.

3. AT&T Texas' invoices are timely and complete.

UTEX admits that the AT&T Texas invoices "arrive on time almost every month."¹⁸⁶ UTEX nevertheless complains that the bills are not timely and complete because they contain "trailing minutes" – i.e., billings for minutes of use from prior months.¹⁸⁷ UTEX suggests that including these trailing minutes in the calculation might change the no-CPN percentage.

In fact, AT&T Texas witness Lynn Layman performed an analysis of trailing minutes from October 2006 to September 2007 to see whether they would change the no-CPN percentage by any significant amount.¹⁸⁸ Only 3 of the 12 months showed any change at all when the trailing minutes were placed into the actual period, and for the 3 months in which a change occurred, the greatest percentage change was 1.73% -- a reduction from 22.74% no-CPN to 21.01% no-CPN. The other two months reflected changes of less than 1%, with the lowest no-CPN percentage being 20.14%, a full 10.14% over the allowed 10% threshold. Mr. Layman also found that while 4 bill periods "after February 2007 show usage for January 2007, the volume in those four other months (March, June, July and August 2007) represents only 314 messages out of a total of 4.7 million messages."¹⁸⁹ As this analysis shows, the "trailing minute volumes are so small that Mr. Lewis' trailing minutes theory has no bearing on the CPN calculation."¹⁹⁰

¹⁸² Tr. 764:3.

¹⁸³ Tr. 762:11.

¹⁸⁴ Tr. 763:2.

¹⁸⁵ AT&T Texas Ex. 24 (Read Dir.) at 5:17-19.

¹⁸⁶ UTEX Ex. G (Lewis Reb.) at 2:4.

¹⁸⁷ UTEX Ex. G (Lewis Reb.) at 2:4-5.

¹⁸⁸ AT&T Texas Ex. 31A (Layman Reb.) at 5:15-21.

¹⁸⁹ AT&T Texas Ex. 31A (Layman Reb.) at 6:10-13.

¹⁹⁰ *Id.* at 6:13-14; *see generally* LDL-12.

Indeed, the very example that UTEX selects to illustrate its point shows that the number of trailing minutes is miniscule and therefore can have no appreciable effect on the CPN percentages. Mr. Lewis selected the billing period from September 5, 2006 to October 4, 2006 and claimed that the minutes from calls in that period were spread over four subsequent bills – October 5, 2006, November 5, 2006, February 5, 2007 and April 5, 2007.¹⁹¹ But the majority of the minutes for the September 5 to October 4 period appeared in the October 5 invoice,¹⁹² and Mr. Lewis admitted that minutes of use that show up in the following invoice (i.e., November 5) are not problematic – from his perspective, it is the trailing data beyond one month that "starts to get suspicious."¹⁹³ Mr. Layman testified, however, that of a total of 1.7 million calls that UTEX delivered to AT&T Texas for the September 5-October 4, 2006 period, minutes from only 6 calls appeared on the February 5 invoice, and minutes from only 17 calls appeared on the April 5 invoice.¹⁹⁴ Thus, out of 1.7 million calls, only 23 of those calls had trailing minutes on the February and April invoices that UTEX complains about. As a matter of simple arithmetic, it would be impossible for 23 calls out of 1.7 million calls to affect in any meaningful way the 50% no-CPN percentage that UTEX posted for the September 5 to October 4 period.¹⁹⁵ The "trailing minutes" argument is just a make-weight argument to justify UTEX's refusal to pay the amounts it owes.

4. AT&T Texas' invoices are accurate.

AT&T Texas witnesses testified unequivocally that the AT&T Texas invoices are generally accurate.¹⁹⁶ UTEX tries to impugn the accuracy of those invoices in various ways, but all of its arguments miss the mark.

"Mysterious line items." UTEX criticizes the AT&T Texas invoices on the ground that so-called "mysterious line items" suddenly appear on the invoices and then disappear, with no explanation.¹⁹⁷ In fact, the examples that Mr. Lewis provides are not "mysterious" at all; they are well-established charges that all CLECs must pay when the services are provided to them. The

¹⁹¹ UTEX Ex. B (Lewis Dir.) at 9:3-8.

¹⁹² AT&T Texas Ex. 31 (Layman Reb.) at 5.

¹⁹³ Tr. 796:20.

¹⁹⁴ AT&T Texas Ex. 31 (Layman Reb.) at 5.

¹⁹⁵ Tr. 800:6 (Mr. Lewis admitting that it is impossible for 23 calls to take the 50% no-CPN figure down below 10%).

¹⁹⁶ See, e.g., AT&T Texas Ex. 24 (Read Dir.) at 3:17-21.

¹⁹⁷ UTEX Ex. B (Lewis Dir.) at 13:14-23.

only mystery is how UTEX could operate for so long while knowing so little about telecommunications billing.

For example, UTEX takes exception to a "mysterious line item" called the "Originating CCL" charge." AT&T Texas witness Lynn Layman testified, however, that Originating CCL charges appear when a 1-800 call is made because 1-800 calls are billed at originating rates.¹⁹⁸ Thus, the presence of Originating CCL charges in some periods simply indicates that UTEX terminated one or more 1-800 calls during those periods. The UTEX witness who complained about the Originating CCL charges, Mr. Lewis, admitted that he does not know what an originating CCL charge is, and he was not aware that originating CCL charges appear when an AT&T Texas end user dials a 1-800 number that terminates to a UTEX number.¹⁹⁹

Mr. Lewis also identifies charges for 1-800 queries as a "mysterious line item," but he apparently does not understand that each 1-800 call requires a query to determine what number the 1-800 call should be terminated to.²⁰⁰ He is evidently unaware that each such query gives rise to an associated 8YY Query Charge.²⁰¹

A third "mysterious line item" identified by Mr. Lewis is a "shared trunk port" for end offices.²⁰² When questioned during the hearing, Mr. Lewis did not know what shared trunk port charges are for and was unaware that those charges are taken directly from AT&T Texas' tariff.²⁰³

Contrary to Mr. Lewis's insinuation, there is no mystery as to why these charges show up on some bills but not others. The CABS system used by AT&T Texas captures both recurring and non-recurring charges.²⁰⁴ If one of the so-called "mysterious line items" shows up on a particular bill, that simply means that an event triggering that charge occurred during the billing period. If the charge disappears the next month, that means no event occurred during that month to cause UTEX to incur the charge.

¹⁹⁸ See AT&T Texas Ex. 31 (Layman Reb.) at 22: 3-6 ("Typical interconnection bills are for terminating usage; therefore, the terminating CCL rate element is billed. Only if 8YY traffic is available would a CLEC see Originating CCL rate elements. Due to the nature of 8YY traffic and its associated tariffs, that traffic is billed at originating rates.").

¹⁹⁹ Tr. 679:11-16.

²⁰⁰ See Tr. 772:21-22 (Mr. Lewis testifying, "I couldn't tell you the definitions or how 1-800 calls get made.").

²⁰¹ AT&T Texas Ex. 31 (Layman Reb.) at 22:8-9.

²⁰² UTEX Ex. G (Lewis Reb.) at 9 (chart).

²⁰³ Tr. 774:2-8.

²⁰⁴ AT&T Texas Ex. 31 (Layman Reb.) at 21:21-22.

Minutes of use discrepancies. UTEX argues that the no-CPN MOU must be incorrect because UTEX's carrier common line ("CCL") MOU do not exceed 10% of UTEX total MOU.²⁰⁵ But UTEX is comparing apples and oranges. CCL charges are based on MOU, while the ICA requires the no-CPN determination to be based on the percentage of *messages* without CPN.²⁰⁶ Because UTEX has many more MOU than messages,²⁰⁷ the CCL MOU figure cannot be used as a proxy for messages and therefore provides no useful guidance on whether the 10% CPN threshold was met.

UTEX's reliance on CCL MOU is also misplaced because the CCL charges reflect only the minutes terminated to AT&T Texas customers. The MOU terminated to an AT&T Texas customer will be less than the total MOU charged to UTEX because UTEX passes calls to AT&T Texas for termination to other LECs (i.e., transit MOU).²⁰⁸

Similarly, UTEX goes astray by challenging the invoices on the ground that the end office MOU, the tandem transport MOU, and the tandem switching MOU do not "fairly closely correspond."²⁰⁹ In fact, tandem switching minutes reflect all MOU delivered to AT&T Texas, while end office MOU reflect only the calls that are terminated to an AT&T Texas customer.²¹⁰ By ignoring the transit function that UTEX knows AT&T Texas performs on UTEX's behalf, UTEX either does not understand simple billing concepts or is trying to confuse the Arbitrators.

Finally, UTEX tries to cast doubt on the AT&T Texas billing system by claiming that the tandem switching minutes dipped sharply in September 2006 and then rebounded in March 2007.²¹¹ AT&T Texas explained, however, that UTEX changed its mode of operation in September 2006 by performing its own Local Number Portability ("LNP") queries.²¹² Until that time, UTEX relied on AT&T Texas to perform the LNP queries, and AT&T Texas did not charge CLECs for interLATA calls when a LNP query was performed.²¹³ Therefore, UTEX's

²⁰⁵ UTEX Ex. C (Lewis Dir.) at 8:10-22.

²⁰⁶ See AT&T Texas Ex. 31 (Layman Reb.) at 26:3-6.

²⁰⁷ See *id.* at 26:13 (noting that UTEX's ratio of messages to minutes is about 3.5 to 1).

²⁰⁸ AT&T Texas Ex. 28 (Dignan Reb.) at 11:21-25.

²⁰⁹ UTEX Ex. C (Lewis Dir.) at 16:22.

²¹⁰ AT&T Texas Ex. 28 (Dignan Reb.) at 12:22-24.

²¹¹ UTEX Ex. G (Lewis Reb.) at 4.

²¹² AT&T Texas Ex. 28 (Dignan Reb.) at 16:12-22.

²¹³ See AT&T Texas Ex. 26 at 9:17-23 ("If the record showed that the query had been made, the call was dropped from processing because it was assumed by AT&T Texas that the IXC had misrouted the call to the CLEC in error and the CLEC could only transmit the call to AT&T Texas over the interconnection trunk group. AT&T Texas did
(Footnote Continued On Next Page)

call volumes dropped significantly when UTEX began performing its own LNP queries. In March 2007, AT&T Texas enhanced its system and began to bill for interLATA calls even when the CLEC performed its own LNP, unless the CLEC provided originating records for AT&T Texas to bill the IXC. UTEX, of course, never provided originating records, so it was subject to billing for interLATA calls beginning in March 2007.²¹⁴ Thus, the sharp decline in tandem switching minutes in September 2006 and the corresponding increase in March 2007 are not evidence of problems with billing. To the contrary, they simply reflect the fact that AT&T Texas stopped allowing UTEX to get away with delivering interexchange traffic without paying for it.

Methods of rating traffic. UTEX complains that in March 2007 AT&T Texas "unilaterally changed how it rates the traffic, without notice," and UTEX claims that the change resulted from a "billing glitch" on AT&T Texas' part.²¹⁵ As explained in the preceding paragraph, however, the changes to the UTEX bills in September 2006 and again in March 2007 resulted not from billing glitches, but instead from changes implemented by UTEX and then from subsequent enhancements to AT&T Texas' system.²¹⁶ As a result of those enhancements, UTEX was required to pay what it owed for passing interexchange traffic to AT&T Texas.

Method of calculating no-CPN percentage. UTEX also tries to cast doubt on the accuracy of the no-CPN calculation because it is done manually, rather than automatically.²¹⁷ But the premise on which UTEX bases its argument – that "significant trailing minutes always exist"²¹⁸ – is demonstrably wrong, as discussed above. Moreover, if the manual calculation led to an erroneous no-CPN result, UTEX could and presumably would demonstrate that error by pointing to a month in which the no-CPN result had to be recalculated based on trailing minutes. The fact that UTEX has not done so shows this is yet another red herring.

not bill UTEX for this type of usage because it assumed that UTEX would send an AUR to AT&T Texas so that AT&T Texas could bill the IXC that misrouted the call.").

²¹⁴ *Id.* at 10:7-8 ("Once AT&T Texas realized that UTEX would not be furnishing AURs, it began billing UTEX again.").

²¹⁵ UTEX Ex. C (Lewis Dir.) at 11:9-11.

²¹⁶ AT&T Texas Ex. 28 (Dignan Reb.) at 16:12 to 17:2; *see also id.* at 17:10-13 ("Not every change AT&T Texas implements results from a problem, as UTEX would have the Commission believe. The vast majority of changes result from the normal ILEC operation of a major telecom billing system."); AT&T Texas Ex. 31 (Layman Reb.) at 21:3-16.

²¹⁷ UTEX Ex. C (Lewis Dir.) at 9:13 to 10:16.

²¹⁸ *Id.* at 9:15.

Differences in AMA data and SS7 data. UTEX further complains that AT&T Texas' AMA data does not match the SS7 data.²¹⁹ Mr. Andrews explained, however, that the two systems were designed for different reasons – the AMA system for billing and the SS7 system for network signaling.²²⁰ The Business Intelligence System that collects the SS7 data was designed and engineered for AT&T's internal study purposes; it was not created to incorporate the redundancy and system availability features common to SS7-based network elements, and therefore it is often subject to the potential for incomplete or missing data.²²¹ Moreover, the way in which the SS7 data is collected can lead to certain data being excluded from the daily ASCII files associated with UTEX. That is not a problem, however, because the SS7 system is not used by AT&T Texas to produce monthly bills. Indeed, the only reason the SS7 data became an issue in this case at all is because UTEX requested that data in discovery and then tried to claim that the AMA billing data is inaccurate because it differs from the SS7 data in some respects.²²²

B. AT&T Texas' invoices comply with the ICA and industry standards.

UTEX does not even dispute that the AT&T Texas invoices comply with the applicable industry standards. Nor could it credibly do so if it tried. The billing system and invoice format employed by AT&T Texas, the Carrier Access and Billing System ("CABS"), is the product of an industry consensus on billing systems and has been in existence for more than 20 years.²²³ "During that time, thousands of customers in numerous territories have been sent millions – perhaps billions – of invoices using this exact system and bill format, and those customers have generally paid those invoices."²²⁴ Today the CABS system is used by AT&T Texas to create invoices for hundreds of other CLECs in the state of Texas and in the entire AT&T Southwestern 5-State Region.²²⁵

Although UTEX complains that the AT&T Texas bills contain "approximately 1,000 pages of meaningless information by end office and tandem,"²²⁶ the industry has specifically demanded that ILECs such as AT&T Texas separate minutes of use quantities and rate elements

²¹⁹ See, e.g., UTEX Ex. C (Lewis Dir.) at 14:15.

²²⁰ AT&T Texas Ex. 25 (Andrews Reb.) at 4:10-13.

²²¹ *Id.* at 3:5-9.

²²² *Id.* at 4:6-15.

²²³ AT&T Texas Ex. 28 (Dignan Reb.) at 7:22 to 8:1 and 8:6-7.

²²⁴ *Id.* at 8:1-4.

²²⁵ AT&T Texas Ex. 31 (Layman Reb.) at 18:3-7.

²²⁶ UTEX Ex. C (Lewis Dir.) at 6:24-25.

by end office and tandem combination.²²⁷ The industry has further demanded that ILECs list minutes of use at each end office by rate element (i.e., local switching, tandem switching, tandem transport, etc.), by jurisdiction, and by from and thru dates.²²⁸ This practice is important to CLECs because it allows them to validate calls on their invoices at a very detailed level.²²⁹ AT&T Texas has always been an active participant in the industry standards process, and the AT&T Texas bill format reflects those standards.²³⁰

It is also important to note that the rates for the various rate elements are not uniform across all end offices for all jurisdictions, and of course the mileage used to calculate the tandem transport rate element differs by end office.²³¹ To apply the correct rate to a call for the actual date of the call requires application of distinct rates by end office, and most CLECs want that kind of detail precisely so they can audit the bills.²³² Indeed, of the hundreds of CLECs being billed under the CABS system, UTEX is the only one who has claimed the invoices are "incomprehensible" or "unauditable."²³³

UTEX nevertheless argues that it has a "unique" ICA, and that the standard industry invoices are not compatible with the business plan UTEX has developed under its unique ICA. The response to that is threefold. First, if UTEX needs a unique billing system, it should have bargained for one in the ICA, or it should offer to pay AT&T Texas to develop such a system. AT&T Texas cannot be expected to alter its billing processes to match whatever business plan each one of the hundreds of CLECs might decide to adopt during the course of its ICA. Second, the invoices are entirely consistent with UTEX's ICA, which says that no-CPN calls will be billed as intraLATA toll when the percentage exceeds the 10% threshold and that interLATA calls terminated on local interconnection trunks will be billed as interLATA toll.²³⁴ Third, as explained above, UTEX already has the CDR it says it needs to understand the bills and to

²²⁷ AT&T Texas Ex. 28 (Dignan Reb.) at 8:7-9.

²²⁸ *Id.* at 8:9-12.

²²⁹ *Id.* at 8:12-13.

²³⁰ AT&T Texas Ex. 24 (Read Dir.) at 8:18-20.

²³¹ *Id.* at 8:13-17.

²³² See AT&T Texas Ex. 24 (Read Dir.) at 4:19-21 (stating that "AT&T Texas has worked cooperatively with the industry through national industry billing forums like the OBF to add the right mix of detail and clarity to the standard invoice format").

²³³ AT&T Texas Ex. 31 (Layman Reb.) at 18:8-11.

²³⁴ AT&T Texas Ex. 28 (Dignan Reb.) at 10:3-7.

determine the percentage of no-CPN calls.²³⁵ Thus, UTEX's claim that it needs more information to understand the bills is just an excuse to avoid paying the bills.

C. Even if AT&T Texas' invoices did not meet all of the standards in DPLs 94 and 95, AT&T Texas would not have waived its right to collect amounts due under the ICA.

DPL Nos. 94 and 95 are grouped together under a heading called "Bad Billing Waiver." As explained above, AT&T Texas did not provide "bad billing" to UTEX, and therefore waiver is not an issue.

Moreover, even if the billing were deficient in some respect, that would not amount to waiver of AT&T Texas' right to recover the amounts due under the ICA or the invoices. Waiver is the intentional relinquishment of a known legal right or intentional conduct inconsistent with claiming that right.²³⁶ Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances.²³⁷ There can be no waiver of a right if the person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right.²³⁸

AT&T Texas has done nothing to indicate or even suggest that it intends to waive its right to collect charges due under the ICA. To the contrary, AT&T Texas has demanded payment from UTEX on a regular basis and has brought this post-interconnection dispute proceeding to enforce that right to payment. The mere fact that UTEX claims to find the invoices "incomprehensible" has no bearing on AT&T Texas' intention to collect the amounts due under those invoices. Therefore, no legal or factual basis exists for the Arbitrators to find waiver in this docket.

D. The Arbitrators should award AT&T Texas \$3,777,388.56 based on corrected billings through September 2007.

The amount that AT&T Texas is entitled to recover through September 2007 is \$3,777,388.56. That amount is less than the amount reflected in original billings to UTEX because of credits that AT&T Texas has determined should be given to UTEX. The total amount owed is calculated as follows:

²³⁵ *Id.* at 10:13-17; *see also* AT&T Texas Ex. 31 (Layman Reb.) at 18-16-20.

²³⁶ *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003).

²³⁷ *Id.*

²³⁸ *Id.*

- Mr. Dignan testified that as of the September 2007 bill month, UTEX owed AT&T Texas \$4,529,537.50.²³⁹
- AT&T Texas reduced that amount by \$250,582.46 to account for an error in manually calculating carrying charges on past due amounts.
- AT&T Texas further reduced the amount by \$167,723.07 to account for a programming error that led to UTEX's being billed for minutes of use based on total connection time, rather than conversation time.
- AT&T Texas also reduced the amount by \$339,843.11 to give UTEX credit for an overcharge for an interconnection rate element.
- The total of these three reductions is \$758,148.64. When that amount is subtracted from the initial total of \$4,529,388.86, the resulting amount is \$3,777,388.56.

Each of the reductions is explained below.

Rationale for the Interest Rate Reduction. During Mr. Cole's deposition in this docket, counsel for UTEX suggested that AT&T Texas had used the wrong interest rate for manually calculating late payment charges. In response, Mr. Cole checked his calculation and concluded that he had in fact made an error. Specifically, when Mr. Cole calculated the late payment charges on UTEX's overdue balances, he used a daily interest rate of 0.00059 and applied this rate for the entire month. The daily rate he should have used was .0005, which yields a monthly rate of 0.155 ($31 * .0005$). Applying the lower monthly rate to UTEX's late payments leads to a reduction of \$250,582.46 to the amount originally calculated. A spreadsheet showing the calculation of interest at the correct rate is attached as Appendix __ to this brief.

Rationale for the Connect Time vs. Conversation Time Reduction. UTEX argued in testimony that AT&T Texas had billed UTEX based on total connection time, rather than on conversation time.²⁴⁰ After investigating UTEX's claim, AT&T Texas agreed that a programming error resulted in the minutes of use charged to UTEX being overstated. In the redirect examination of Panel 4, AT&T Texas attempted to offer a credit for the error, but UTEX objected.²⁴¹ AT&T Texas nevertheless believes that it is appropriate to provide a credit to offset amounts that should not have been charged to UTEX.

Based on its analysis of the AMA data, AT&T Texas found that the overstatement of minutes of use due to the use of connection time rather than conversation time was

²³⁹ AT&T Texas Ex. 19A (Dignan Dir.) at 13

²⁴⁰ UTEX Ex. I (Lewis Reb.) at 3, ll. 3-6.

²⁴¹ Tr. at 733, ll. 10-12.

approximately 8%. Applying that 8% to UTEX's bills for the period in which the programming error existed – through July 2006 – results in a credit amount of \$107,688.49 and a credit of late payment charges of \$60,034.58 through the December 2007 billing period. A spreadsheet showing the calculation is attached as Appendix ___ to this brief.

Rationale for the Rate Element Reduction. After the conclusion of the hearing on the merits, AT&T Texas discovered that another operator input error led to a non-zero charge for a rate element in a CABS table, when the proper amount for that element should have been zero. That error caused UTEX to be overcharged by \$288,127.19 for the period from August 2006 to November 2007. The late payment charges attributable to that amount totaled \$51,715.92, so AT&T Texas will credit UTEX with a total of \$339,842.11 for the rate element reduction. A spreadsheet showing the calculation of this credit is attached as Appendix ___ to this brief.

Because the rate element error was not discovered until after the hearing and the close of the record, AT&T Texas realizes that there is no evidence in the record to support this reduction. However, AT&T Texas seeks to recover no more than what UTEX actually owes, and UTEX does not owe the \$339,842.11 attributable to the erroneous rate element.

Based on these credit calculations, UTEX owed a total of \$3,777,388.56 as of September 2007. Additional amounts have accrued since that time, and AT&T Texas will seek to recover those additional amounts at the appropriate time. Of the \$3,777,388.56 owed by UTEX as of September 2007, \$675,836.87 is attributable to access charges for termination of interexchange traffic over local trunks. This \$675,836.87 reflects a proportionate application of the credits described herein to the original \$755,000 testified to by Mr. Dignan and Mr. Cole.²⁴² The remaining amount is for intraexchange access charges arising out of no-CPN billings.

XII. INTEREXCHANGE CARRIERS THAT PARTICIPATE IN THE ROUTING OF THE TRAFFIC THAT UTEX DELIVERS TO AT&T TEXAS ARE NOT NECESSARY PARTIES.

DPL Issue No. 36 asks which IXC's, if any, have routed telephone toll traffic through UTEX's interconnection facilities so as to avoid switched access charges from AT&T Texas. Mr. Constable listed twenty-eight such IXC's in his rebuttal testimony to demonstrate that the traffic AT&T Texas is terminating for UTEX is interexchange traffic.²⁴³ There may be many

²⁴² AT&T Texas Ex. 19 (Dignan Dir.) at 9:10-12; AT&T Texas Ex. 17 (Cole Dir.) at 31:11-12.

²⁴³ See AT&T Texas Ex. 27A (Constable Reb.) at 16:24-28. Because the names of the IXC's are confidential, AT&T Texas will not identify them in this brief, but instead will simply refer to the pertinent part of the testimony.

more of them, but it is not possible for AT&T Texas to identify all of the IXCs routing interexchange traffic on UTEX's trunks.²⁴⁴ UTEX is the party who is passing the traffic to AT&T Texas, and therefore UTEX is the party who either has or should have access to the identities of those IXCs.²⁴⁵

DPL Issue No. 37 asks whether those IXCs are indispensable parties to this case. They are not for several reasons. First, under the Commission's rules, the only entities who may participate as parties in a post-interconnection dispute resolution proceeding are the parties to the interconnection agreement,²⁴⁶ and the only parties to the ICA are AT&T Texas and UTEX. The IXCs cannot be considered indispensable parties when the Commission's rules prohibit them from being parties.

Second, UTEX is the party that sent the traffic at issue to AT&T Texas, and under the terms of the ICA UTEX is responsible for its own network, meaning that it owes the access charges for interexchange traffic it sends to AT&T Texas' network.²⁴⁷ Whether UTEX can proceed against the IXCs in another forum is a matter of contract between UTEX and those IXCs, but UTEX cannot drag them into this case, as the Arbitrators have already found.²⁴⁸

Third, the IXCs do not qualify as indispensable parties under Texas Rule of Civil Procedure 39. Under that rule, a person who is subject to service of process shall be joined as a party in the action "if in his absence complete relief cannot be accorded among those already parties."²⁴⁹ As noted above, complete relief can be accorded among those already made parties because UTEX is responsible under the ICA for the traffic that it passes to AT&T Texas. Therefore, the IXCs do not meet the standard in the rule for indispensable parties.

²⁴⁴ AT&T Texas Ex. 17 (Cole Dir.) at 32:4-8.

²⁴⁵ See AT&T Texas Ex. 22 (Layman Dir.) at 11:10-11.

²⁴⁶ P.U.C. R. 21.125(f).

²⁴⁷ AT&T Texas Ex. 22 (Layman Dir.) at 12:1-3; AT&T Texas Ex. 17 (Cole Dir.) at 32:17-18 ("[U]nder the parties' ICA, UTEX is responsible for the access charges related to delivery of this traffic.").

²⁴⁸ Tr. 5:15-20 (denying UTEX's motion for leave to implead the IXCs).

²⁴⁹ Tex. R. Civ. P. 39. A party may also be indispensable under Rule 39 if he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. Because the IXCs are not claiming any interest in this matter, that prong of the rule is inapplicable.

XIII. AT&T TEXAS' CLAIMS ARE NOT BARRED BY WAIVER, ESTOPPEL, LACHES, ACCORD AND SATISFACTION, UNCLEAN HANDS, OR ANY STATUTES OF LIMITATIONS.

The Commission should reject UTEX's assertion that AT&T Texas' claims are barred by limitations. Section 9.1.1 of the GTC establishes a contractual limitations period that controls AT&T Texas' right to bring this claim. It allows parties to bring disputed claims within "24 months from the date the occurrence which gives rise to the dispute is discovered or reasonably should have been discovered." AT&T discovered the billing issues that are the subject of this proceeding less than 24 months prior to filing its petition.²⁵⁰ The billing periods at issue begin with December 2004, and AT&T filed its petition on October 6, 2006, less than 24 months from the first month of billings in dispute and well within the contractual limitations period.

As the ICA prescribes the time period in which claims may be brought, the defense of laches is not available.²⁵¹

UTEX's assertion of waiver is meritless. Pursuant to § 18.1 of the GTC, the parties' rights and obligations under the ICA may not be waived unless the same is in writing and signed by an officer of the party against whom such waiver is claimed. No such waiver exists here.

Estoppel also does not apply. The elements of equitable estoppel are: "(1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations."²⁵² UTEX has provided no credible evidence of any of these elements.

UTEX has presented no evidence to support the defense of accord and satisfaction. "The accord and satisfaction defense rests upon a contract, express or implied, in which the parties agree to the discharge of an existing obligation by means of a lesser payment tendered and accepted."²⁵³ UTEX has never offered to pay AT&T Texas *anything* on its claims and could not, therefore, have any kind of argument that there has been an accord and satisfaction between the parties.

²⁵⁰ Pellerin Direct at 17; *see also* Cole Direct at 12.

²⁵¹ *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998) ("Laches should not bar an action on which limitations has not run unless allowing the action 'would work a grave injustice.'").

²⁵² *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515-16 (Tex. 1997).

²⁵³ *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 863 (Tex. 2000).

The doctrine of unclean hands is not available to UTEX. This doctrine is an equitable one that has no application to actions at law for damages for breach of contract.²⁵⁴ But UTEX also has provided no evidence of “unclean hands” on the part of AT&T Texas.

XIV. THE COMMISSION HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED.

The Commission has full authority to grant the relief that AT&T has requested. The Commission addressed this specific issue in Order No. 7 in Docket No. 31340. In Docket No. 31340, the Commission addressed its authority to award damages as part of post-interconnection relief and properly found that it had the authority to determine the amount of compensation that one carrier owed the other under an ICA. As the Commission there noted, the authority to enforce ICAs comes from the federal law. The federal courts, including the Fifth Circuit, have held that state commissions have not only the plenary authority to approve or disapprove ICAs but also “the authority to interpret and enforce the provisions” of ICAs that they have approved.²⁵⁵ In finding that it had authority to determine the amount of money one CLEC owed the other under a billing dispute, the Commission also relied on its Procedural Rule 21.125(h), which “authorizes the award of a broad range of remedies and only excludes the award of punitive and consequential damages, making direct damages available as a remedy.”²⁵⁶

XV. UTEX’S SIGNALING LAYER TRANSLATION SERVICE CHARGES ARE INVALID AND SHOULD BE REJECTED.

UTEX has submitted bills to AT&T Texas for Signaling Layer Translation Service (“SLTS”) charges, even though UTEX admits that those charges do not arise under the ICA and that they are contrary to the purpose of the Federal Telecommunications Act (“FTA”). UTEX simply invented those charges and tried to impose them on AT&T Texas without authority or justification. Therefore, the Arbitrators should reject UTEX's claim that AT&T Texas owes any SLTS charges.

At the outset, it is necessary to define what SLTS charges are. UTEX's switching equipment processes traffic in Internet Protocol (“IP”) format. UTEX therefore has to switch

²⁵⁴ *Sammons Enterprises, Inc. v. Manley*, 540 S.W.2d 751, 757 (Tex. Civ. App.—Texarkana 1976, writ ref’d n.r.e.). See also *Furr v. Hall*, 553 S.W.2d 666, 672 (Tex. Civ. App.—Amarillo 1977, writ ref’d n.r.e.) (“[T]he ‘clean hands’ maxim is strictly an equitable doctrine not applicable outside of equitable proceedings.”).

²⁵⁵ Docket 31340, *Petition of SBC Texas for Post-Interconnection Dispute Resolution With Tex-Link Communications, Inc., Under The FTA Relating To Intercarrier Compensation*, Order No. 7 at 2 (Oct. 26, 2005) (citing *Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000)).

²⁵⁶ *Id.* at 5.

traffic from the Public Switched Telephone Network ("PSTN"), which is in Time Division Multiplexing ("TDM") format, to IP format. When UTEX is ready to hand the call back to the PSTN, it has to convert the traffic from IP format back to TDM format. The conversions from TDM format to IP format and from IP format to TDM format are the ostensible services for which UTEX bills the SLTS charges. For numerous reasons, those charges cannot be imposed on AT&T Texas.

First, there is no basis in the ICA for those charges. Indeed, Mr. Feldman admitted in his testimony that he created a tariff with the SLTS charges to "force [AT&T Texas] to buy from us."²⁵⁷ Thus, the ICA does not control the issue of whether UTEX may bill AT&T Texas for SLTS charges.

Second, Mr. Feldman admitted that the SLTS charges are contrary to the intent of the FTA. After acknowledging that he created the charges in an effort to force AT&T Texas to buy UTEX's services, Mr. Feldman said, "I believe this approach is counter to the intent of the [FTA]."²⁵⁸ UTEX should not be allowed to impose charges that it concedes to be in violation of the FTA.

Third, AT&T Texas did not order or "constructively order" any of the services for which UTEX is attempting to collect the SLTS charges.²⁵⁹ UTEX produced no evidence whatsoever that AT&T Texas ordered the SLTS services. And to show that AT&T Texas constructively ordered the services, UTEX would have to prove that AT&T Texas somehow benefited from them. But as Mr. Constable explained, the customers to whom UTEX provides protocol conversion, assuming it provides any conversion at all, are UTEX's own customers, not the terminating carriers.²⁶⁰ Moreover, every service order that UTEX has provided to AT&T Texas has shown that UTEX did not need to perform a protocol conversion because UTEX received the traffic in TDM format, rather than IP format.²⁶¹ Thus, UTEX's conversions from TDM to IP and from IP to TDM, if they were performed, were needless exercises for which UTEX should not be compensated.

²⁵⁷ UTEX Ex. C (Feldman Dir.) at 48:1-2; *see also* AT&T Texas Ex. 18 (Constable Dir.) at JEC-3 (e-mail from UTEX employee Richard Lewis conceding that the SLTS charges may not be covered by the ICA).

²⁵⁸ UTEX Ex. C (Feldman Dir.) at 48:13-14.

²⁵⁹ AT&T Texas Ex. 18 (Constable Dir.) at 62:2.

²⁶⁰ *Id.* at 62:13-14.

²⁶¹ *Id.* at 62:17-21.

Fourth, UTEX is charging its IGI-POP customers to convert their IP traffic to SS7, which is the exact same service for which UTEX is trying to charge AT&T Texas.²⁶² UTEX is therefore seeking a double recovery for something it need not do in the first place.

Fifth, under the ICA UTEX has the responsibility to use trunks with SS7 protocol signaling capability for the traffic sent to AT&T Texas.²⁶³ Because UTEX is required to use SS7 trunks, it has the financial obligation to convert its traffic to SS7.

Finally, the industry practice is for carriers to convert their traffic to a format that the PSTN can accept.²⁶⁴ UTEX's attempt to tariff the conversion it claims to perform and to bill non-ordering carriers for that conversion amounts to gross over-reaching.

For the reasons set forth above, the SLTS charges cannot be imposed on AT&T Texas under either the ICA or the UTEX tariff. Therefore, the Arbitrators should find that AT&T Texas is not responsible for paying invoices containing SLTS charges. (DPL Nos. 90-91)

XVI. UTEX'S CLAIMS UNDER ATTACHMENT 17 FOR PERFORMANCE MEASURE DAMAGES ARE MERITLESS.

Attachment 17 of the ICA establishes detailed, explicit performance criteria for AT&T Texas and imposes liquidated damages and assessments for failure to meet those criteria. Liquidated damages are owed under Attachment 17 only for failures to meet the specific standards set out in Attachment 17 regarding certain areas of performance. Section 1.1.2 provides that the performance measurements included in Attachment 17 are “the set of measurements listed in Section 9.0 of this Attachment, as it may be supplemented or modified by agreement of the Parties.”²⁶⁵ No supplementation or modification has been agreed to by UTEX and AT&T Texas.²⁶⁶ Thus, the only performance measurements imposed on AT&T Texas in Attachment 17 are those defined in Section 9.

UTEX raises four performance measurement and remedy plan issues that are in the Combined DPL. None of these issues addresses performance measurements described in Section 9.1, and therefore none of these claims is covered by the performance measures and liquidated damages provided in Attachment 17A.

²⁶² *Id.* at 63:5-10.

²⁶³ *Id.* at 63:13-21.

²⁶⁴ *Id.* at 64:3-10; *see also* UTEX Ex. C (Feldman Dir.) at 48:13-15 (Mr. Feldman admitting that the SLTS charges are contrary to the intent of the Federal Telecommunications Act).

²⁶⁵ Joint Ex. 38A, Attachment 17, §§ 1.1.2, 9.0 – 9.6.8.

²⁶⁶ *See id.*

A. The performance breaches claimed by UTEX do not constitute a performance breach under Attachment 17 to the ICA.

First, as reflected in DPL 11, UTEX alleges that AT&T Texas is responsible for performance breaches in the general areas of ordering and provisioning of interconnection facilities, including SS7 B-links and ISDN, as well as in allegedly failing to provide pre-ordering information in response to requests for dark fiber. Attachment 17, however, does not contain measurements for pre-ordering, ordering or provisioning of interconnection trunks or dark fiber. Therefore, by its own explicit terms, Attachment 17 does not apply to any of the performance breaches alleged by UTEX and retained in the Combined DPL Issues 12 through 21 — ordering and provisioning interconnection trunks — and Issue 22 — responding to requests for pre-ordering information pertaining to dark fiber.

Second, even if there were performance measurements that applied to these provisioning issues, UTEX's claims still fail because UTEX did not submit valid service orders for any of the facilities about which it complains.²⁶⁷ The receipt of a valid service order is required to trigger ordering and provisioning activities so that the activities can be identified, isolated and measured. Absent a valid service order, no ordering and provisioning activities occur and there is simply no performance to measure. Because UTEX did not submit valid service orders for the interconnection trunks at issue — and did not even attempt to provide the Commission with evidence of such orders — no ordering and provisioning activities occurred, and therefore no data was or could be gathered.

B. AT&T Texas has properly made available to UTEX reports relating to performance standards under Attachment 17.

UTEX's next claim is that AT&T Texas has failed to provide UTEX with reports regarding whether AT&T Texas has complied with the performance standards in Attachment 17. This claim is baseless as well. Section 6.2 of Attachment 17 requires that "Reports ... be made available to the Competitive Local Exchange Carrier ("CLEC") by the 15th day following the close of the calendar month." AT&T Texas posts performance measurement data on an Internet website to which all CLECs, including UTEX, have access.²⁶⁸ This website was created pursuant

²⁶⁷ AT&T Texas Ex. 20 (Dysart Dir.) at 5, ll. 4-6

²⁶⁸ AT&T Texas Ex. 20 (Dysart Dir.) at 8, l. 15 – 9, l. 8.

to the Commission's recommendation in Docket No. 16251 and meets the requirement in § 6.2 of the ICA to make reports available.²⁶⁹

C. The performance standards in the T2A do not apply to UTEX's ICA.

UTEX does not have the T2A as its agreement and, therefore, the performance measures in the T2A do not apply to UTEX.

D. AT&T Texas properly self reports its performance results and UTEX is entitled to no credits or payments under Attachment 17.

AT&T Texas properly self reports and, as AT&T Texas witness' Randy Dysart testified, UTEX is entitled to neither payments nor credits under Attachment 17.²⁷⁰

XVII. UTEX HAS FAILED TO ESTABLISH ANY RIGHT TO ISDN INTERCONNECTION IN ACCORDANCE WITH THE COMMISSION'S REQUIREMENTS IN DOCKET NO. 29944.

In Docket No. 29944, the Commission determined that any right UTEX had to obtain ISDN interconnection was contingent upon UTEX's satisfying several requirements.²⁷¹ UTEX has failed to prove that it has satisfied these requirements. Because UTEX has been unable to demonstrate that it has been able to modify the ISDN protocol in a manner that allows it to satisfy the criteria of the ICA and the Commission's decision in Docket No. 29944, ISDN is currently not a viable or permissible method of interconnection.

The Arbitration Award in Docket No. 29994 required UTEX to do the following in order to use ISDN for interconnection: 1) function as a Class 5 switch; (2) provide signaling; (3) provide billing; (4) provide error treatment; (5) provide protocol interworking; (6) administer its own numbers; (7) conform to federal and state requirements and industry standards; and (8) provide line number portability ("LNP"). The pertinent rulings are quoted below:

[I]n order for UTEX to utilize this method of interconnection, UTEX must assume the responsibility to modify its network elements to perform as a Class 5 switch, including but not limited to signaling, billing, and error treatment. UTEX shall also assume the responsibility to modify its network elements to conform to meet current federal and state requirements and industry standards, including but not limited to, Local Number Portability (LNP) protocol inter-working, number

²⁶⁹ *Id.* at 8, ll. 15-19.

²⁷⁰ *Id.* at 11, ll. 1-6.

²⁷¹ Complaint And Request For Expedited Ruling Of UTEX Communications Corporation Regarding Post Interconnection Agreement Dispute With SBC Texas, Docket No. 29944, Arbitration Award at 39-48 (March 24, 2005).

pooling and customer assignable NPA/NXXs consistent with the requirements of Appendix A to Attachment 25. (at 39-40)

* * * * *

UTEX shall assume the responsibility as outlined in Appendix A of Attachment 25: ISDN Interconnection Methods. The use of a Class 5 switch in the PSTN has evolved over time as the “gold standard” in the telecommunications industry. It is time-tested, its protocols are well understood, and its reliability and functionality have been acknowledged. Therefore, any proposed method of interconnection, ISDN or otherwise, must meet this standard. . . . Additionally, UTEX has the responsibility to ensure that its Class 5 switch or equivalent shall also perform, including but not limited to, the following functions: (1) dial tone to end users via line/loop connections containing customer assignable NPA/NXXs (telephone numbers), (2) connects to other Class 5 end office switches and tandem switches via voice grade trunking connections, (3) provides protocol inter-working, and (4) meets federal requirements for LNP.

* * * * *

UTEX is contractually obligated to assume the responsibility as indicated in Appendix A of Attachment 25: ISDN Interconnection Methods, to modify their network elements to perform as a Class 5 switch, including but not limited to, signaling, billing and error treatment in order to interconnect with SBC Texas utilizing the ISDN-PRI method. . . . Additionally, in order for UTEX to comply with federal requirements 47 C.F.R. § 52.26 for LNP, UTEX shall host their own NPA/NXXs and LRN in the UTEX switch. (44)

* * * * *

The industry standards applicable for LNP are incorporated into 47 C.F.R. § 52.26 and the references made to the Working Group Report that details LNP switching operations is “Section 7, LNP Assumptions (Wireline Only).” Therefore the Arbitrators conclude that UTEX shall adhere to the guidelines as set forth in 47 C.F.R. § 52.26 and the Working Group Report. (45)

* * * * *

Error treatment will generally follow generally accepted practices and policies of the PSTN. For additional discussion on using ISDN as method of interconnection to the PSTN, see also DPL No. 3b.²⁷² (48)

In Docket No. 29944, the Commission declined to order ISDN for interconnection because UTEX had failed to meet the requirements under the ICA. A mere 18 business days after the Arbitration Award was issued in Docket No. 29944, Mr. Feldman notified AT&T Texas that UTEX had “our facilities ready and established and can place an order for ISDN interconnection immediately.”²⁷³ Mr. Feldman’s email, however, failed to provide any kind of explanation of what UTEX had done to meet the numerous requirements imposed by the Commission in Docket No. 29944. UTEX’s conclusory assertion in April of 2005 that it had

²⁷² Docket No. 29944 Arbitration Award at 39-40, 41-42, 44-45, 46, 48.

²⁷³ AT&T Ex. 18 (Constable Dir.), Attachment JEC-10.

complied with the Commission's Order is simply not credible. As the Commission found in Docket No. 29944, the PSTN and the SS7 protocol that it uses have evolved over time to meet the demands of the telecommunications industry.²⁷⁴ It is time-tested, well understood, reliable, and functional.²⁷⁵ It has been modified to provide intercarrier compensation billing, along with new technologies such as Local Number Portability.²⁷⁶ It is not credible that UTEX could have re-engineered its network to establish a retail business service to provide all of the functionality that SS7 offers in a mere 18 business days. Mr. Feldman's assertion that it has is nothing more than a repetition of the claims that UTEX made in Docket No. 29944, where it also asserted that it had met the requirements of the ICA.

Nor does UTEX provide any proof in either its direct or its rebuttal testimony that it has done anything to comply with the requirements of Docket No. 29944, whether before the above-referenced communications or since. In its testimony, UTEX describes no specific change or modification that it has made to its network to conform to the substantial conditions that the Commission imposed upon UTEX in order to use ISDN for interconnection purposes. Instead, it provides only conclusory, and virtually identical, testimony from Mr. Telfer and Mr. Feldman.²⁷⁷ Each of these witnesses provided a perfunctory "yes" answer as to whether UTEX (1) has a Class 5 switch, (2) can provide signaling, (3) can provide billing, (4) can provide error treatment, and (5) can provide dial tone, connections to other Class 5 end office and tandem switches, protocol inter-working, and federal LNP requirements.

In rebuttal, neither witness does any better. Mr. Feldman provides a laundry list of the "physical gear" that UTEX has for SS7-based interconnection and suggests this will be used for ISDN but does not explain how this "gear" is to be used or even whether it was added after the Commission's ruling in Docket No. 29944.²⁷⁸ Instead, he punts the issue to Mr. Telfer, asserting that "Mr. Telfer will address the technical issues."²⁷⁹ Mr. Telfer, however, does not catch the ball and run with it. While he offers intermittent and strident criticisms of Mr. Constable, he

²⁷⁴ Docket No. 29944 Arbitration Award at 41-42.

²⁷⁵ *Id.*

²⁷⁶ *See id.* (discussing requirements).

²⁷⁷ Compare UTEX Ex. A (Telfer Dir.) at 37, l. 5 – 39, l. 2 with UTEX Ex. C (Feldman Dir.) at 51, l. 2 – 53, l. 10.

²⁷⁸ UTEX Ex. H (Feldman Reb.) at 11, l. 20 – 12, l. 20.

²⁷⁹ *Id.* at 40, ll. 7-8.

provides no explanation of what it is that UTEX has supposedly done to enable it to comply with the Commission's decision in Docket No. 29944.²⁸⁰

Thus, in addition to not being credible, Mr. Feldman's and Mr. Telfer's testimonies do not show that UTEX has satisfied the requirements of Docket No 29944. For example, while both witnesses broadly assert that UTEX can provide signaling, they fail to show that UTEX can provide the signaling required by the FCC and industry standards in conjunction with ISDN. As Mr. Constable testified, the only kind of signaling UTEX can perform is the user end of the ISDN protocol.²⁸¹ The Arbitration Award in Docket No. 29944 requires that UTEX provide not merely signaling, but Class 5 signaling, as opposed to end user signaling.²⁸² "UTEX cannot do this, and does not assert that it can."²⁸³ In fact, Mr. Telfer agrees that UTEX cannot provide the signaling parameters necessary for LNP.²⁸⁴

Similarly, while both witnesses assert that "We have the ability to issue bills,"²⁸⁵ neither explains whether UTEX has the ability to perform Class 5 switching billing capabilities in conjunction with ISDN. In fact, UTEX has impliedly conceded that it cannot provide such billing because it cannot and does not bill on a minute of use ("MOU") basis.²⁸⁶

Again, while both Mr. Feldman and Mr. Telfer assert that UTEX has "modified its network elements to provide error treatment," they fail to explain what kind of modifications have been made and fail to testify how UTEX could perform Class 5 switching error treatment. As Mr. Constable explains in both his direct and rebuttal testimony, UTEX cannot perform such switching because the cause codes used for error treatment purposes are not signaled through ISDN.²⁸⁷

Both Mr. Feldman and Mr. Telfer assert that UTEX can provide dial tone to end users, connections to other Class 5 switches, and protocol interworking, and can meet federal LNP requirements. They do not assert that they can do such things utilizing the ISDN protocol. Additionally, they fail to show how or to explain *anything* UTEX has done to meet these

²⁸⁰ See UTEX Ex. F (Telfer Reb.) at 15-21.

²⁸¹ AT&T Texas Ex. 27 (Constable Reb.) at 29, ll. 6-10.

²⁸² Docket 29944 Arbitration Award at 42.

²⁸³ AT&T Texas Ex. 27 (Constable Reb.) at 29, l. 14.

²⁸⁴ UTEX Ex. F. (Telfer Reb.) at 19, l. 21- 20, l. 21.

²⁸⁵ UTEX Ex. A (Telfer Dir.) at 38, l. 5; UTEX Ex. C (Feldman Dir.) at 52, l. 5.

²⁸⁶ UTEX Ex. B (Lewis Dir.) at 8.

²⁸⁷ AT&T Texas Ex. 18 (Constable Dir.) at 48, ll. 20-27; AT&T Texas Ex. 27 (Constable Reb.) at 30, ll. 1-5.

requirements. As Mr. Constable explains, UTEX has not and cannot do any of these things with ISDN.²⁸⁸ Mr. Feldman himself states that UTEX does not provide local exchange service.²⁸⁹ Thus, by Mr. Feldman's own testimony, UTEX does not satisfy the criteria to use ISDN for interconnection purposes.

In his rebuttal testimony, Mr. Telfer concedes that UTEX has not met its LNP obligations under Docket No. 29944, asserting that he believes UTEX *could* meet those obligations if only AT&T Texas' engineers would assist him.²⁹⁰ First of all, the Commission's order in Docket No. 29944 imposed these obligations on UTEX, not AT&T Texas. AT&T Texas is not obligated to assist UTEX in figuring out what it needs to do to comply with the Commission's decision. AT&T Texas engineers cannot show UTEX how to house its own numbers in the UTEX switch in conjunction with ISDN Interconnection, because ISDN Interconnection was designed to operate with retail end users and, as such, requires the numbers to be housed in the AT&T Texas switch.²⁹¹ Thus, in order for ISDN to be functional, the numbers must reside in AT&T Texas' switch.²⁹² "For a user-to-network ISDN, the network side has to provision a number on the network side in the network switch to render that service functional. Otherwise, it's just a piece of copper that can't transmit anything."²⁹³ Yet, per the Commission's decision in Docket No. 29944, "UTEX shall host their own NPA/NXXs and LRN in the UTEX switch."²⁹⁴ UTEX has proffered no explanation of how it could comply with this part of the decision in Docket No. 29944. And Mr. Feldman's own conduct indicates that UTEX has no intention of housing the numbers in its own switch. In Mr. Feldman's e-mail shortly after the Docket No. 29944 Order was released, he made clear that, while UTEX could (it claimed) provide numbers, UTEX still expected the numbers to reside in the AT&T Texas switch, and for AT&T Texas to provision and administer them.²⁹⁵

UTEX has provided no credible evidence that it has done anything to comply with the requirements of Docket No. 29944 for ISDN interconnection. Instead, UTEX is seeking another

²⁸⁸ AT&T Texas Ex. 18 (Constable Dir.) at 42, l. 9 -50, l. 21.

²⁸⁹ See, e.g., UTEX Ex. H (Feldman Reb.) at 65, l. 33 – 66, l. 1.

²⁹⁰ UTEX Ex. F (Telfer Reb.) at 19, l. 21 – 20, l. 21.

²⁹¹ AT&T Texas Ex. 18 (Constable Dir.) at 43, l. 24 – 44, l.3.

²⁹² Tr. at 487, l. 24- 488, l. 6 ("If I don't put the number in the switch, that service is not functional and neither party can send traffic.").

²⁹³ Tr. 492, ll. 20-24.

²⁹⁴ Arbitration Award, Docket 29944, at 44.

²⁹⁵ AT&T Ex. 18 (Constable Dir.) at 49, l. 19 – 50, l.

bite at the apple on this issue by attempting to circumvent the proof required under the Commission's decision in Docket No. 29944. The Commission should reject UTEX's attempt to relitigate its request for ISDN interconnection.

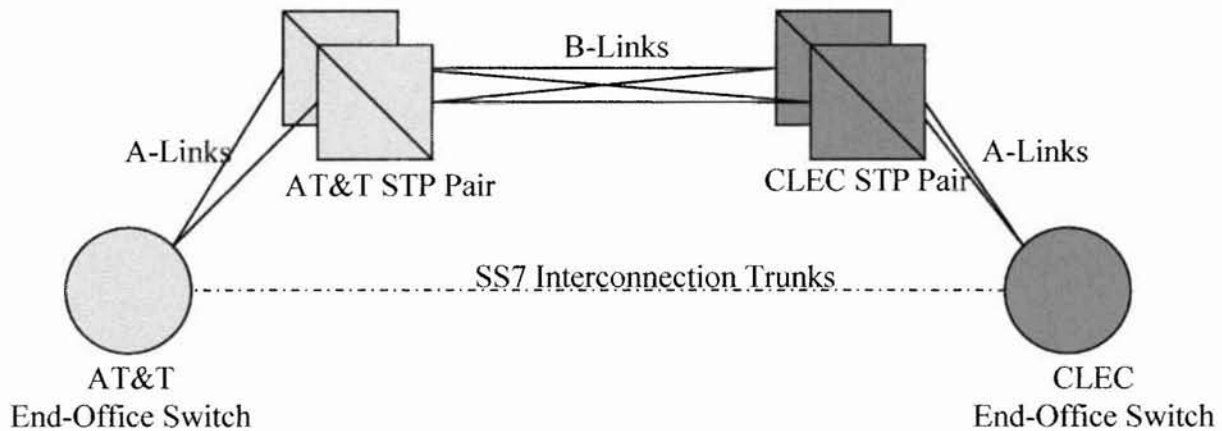
XVIII. UTEX IS NOT ENTITLED TO SS7 B-LINKS FOR FREE.

In DPL Issues 5 through 10, UTEX makes various arguments in support of obtaining SS7 B-links from AT&T Texas for free. AT&T Texas is more than willing to provide UTEX with B-links, but it must pay for them just like everyone else does. B-links are readily available for purchase out of AT&T Texas' tariffs. UTEX itself currently purchases similar facilities from a third-party carrier for more than it would pay AT&T Texas if it purchased out of AT&T Texas' tariff.²⁹⁶ It is disingenuous for UTEX to craft arguments to circumvent that legitimate cost of doing business.

In order to understand the B-links issue, Mr. Constable provided an explanation of just what they are. The SS7 network is a data overlay network to the switched network that carries end user voice grade traffic. The SS7 network uses SS7 links, SS7 Signal Transfer Points ("STPs") and call-related databases to assist in call set up and routing. An SS7 message from AT&T Texas to a CLEC starts at the AT&T Texas end office switch and is sent over A-links (A-links connect end offices, and other network elements, to STPs) to the appropriate AT&T Texas STP pair. STPs are network elements that route SS7 messages to connect and disconnect the voice trunks between end office switches. The SS7 call setup message is then sent to the CLEC STP pair, where it is terminated to the CLEC end office over CLEC provided A-links. Finally, B-links connect pairs of STPs together.²⁹⁷ A diagram is below.

²⁹⁶ *Id.* at 57, ll. 8-13.

²⁹⁷ *Id.* at 52, l. 3 – 53, l. 4.



The SS7 network is also used to query various call-related databases, such as 800, Calling Name (“CNAM”), Line Information Database (“LIDB”) and the Advanced Intelligent Network (“AIN”) databases.²⁹⁸

In its proffered DPLs, UTEX suggests that it is entitled to B-Links for free either through the parties’ ICA or the FTA and FCC Rules or both. UTEX’s relationship with AT&T Texas regarding use of facilities for interconnection, however, is governed by the ICA.

The UTEX SS7 Appendix to the ICA contains a single sentence that simply states SS7 signaling will be provided in accordance with the UNE Appendix.²⁹⁹ The FCC ruled in the Triennial Review Order (“TRO”) that SS7 is no longer provided as a UNE,³⁰⁰ and the parties’ ICA includes a TRO amendment that removes SS7 from the ICA, unless used in conjunction with Unbundled Local Switching (“ULS”), which is not applicable here.³⁰¹ Therefore, UTEX is not entitled to SS7 signaling under the ICA. In the TRO, the FCC found that “for competitive carriers deploying their own switches, there are no barriers to obtaining signaling or self-provisioning signaling capabilities and we do not require incumbent LECs to continue offering

²⁹⁸ *Id.* at 53, ll. 5-7/

²⁹⁹ Joint Ex. 38A, SS7 Appendix.

³⁰⁰ *In Re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 2003 WL 22175730, 18 FCC Rcd., 19020, 16978 at ¶ 546 (Sept. 17, 2003) (“TRO”) (“[W]e reject the claims of competitive carriers that signaling networks should remain available as UNEs.”)

³⁰¹ Joint Exh. 38A, Amendment Conforming Post TRO Remand.

access to signaling as a UNE under section 251(c)(3) of the Act.”³⁰² The end result is that the governing ICA between the parties simply includes no provisions for UTEX to obtain SS7 signaling from AT&T Texas. UTEX does have other means, however, to purchase SS7 directly from AT&T Texas, such as through its access tariffs.³⁰³

Finally, even if the UNE Appendix was applicable—which it is not—it does not give UTEX what it wants, for two reasons. First, application of the UNE Appendix would require UTEX to pay the UNE rates that are provided in the Appendix.³⁰⁴ Second, the UTEX UNE Appendix essentially states that if both parties mutually agree that new SS7 facilities are needed, then AT&T Texas will charge the CLEC its tariffed rates and the CLEC will charge AT&T Texas the lesser of its tariffed rate or AT&T Texas’ tariffed rate.³⁰⁵ Mr. Telfer acknowledges that AT&T Texas does not have to provide B-links unless the parties mutually agree.³⁰⁶ Because AT&T Texas does not agree that new links would be mutually beneficial, there is no obligation under the UNE Appendix to provide SS7 Signaling.

Although the ICA doesn’t require that either party explain why they disagree that new links would be mutually beneficial, Mr. Constable set out many reasons for AT&T Texas’ conclusion that it would not be mutually beneficial to add new SS7 facilities. First, the preponderance (99.6%) of the traffic is from UTEX to AT&T Texas, and as a result, AT&T Texas would have very little of its end user originated traffic to use with the SS7 links. Second, UTEX has indicated that it would like to use AT&T Texas’ SS7 signaling network to access AT&T Texas’ call-related databases for free, as well. These databases provide LNP, 800, LIDB and Caller Name services, and AT&T Texas has no obligation to provide UTEX access to these databases for free. Third, the current SS7 links are fully operational and adequate to meet the parties’ needs, and AT&T Texas sees no benefit in changing the current architecture.³⁰⁷ Moreover, there are other problems. For example, in discussions with UTEX, Mr. Constable observed that UTEX did not want to use the links to exchange local telecommunications traffic

³⁰² TRO at ¶ 545.

³⁰³ Docket 28821, *Arbitration Of Non-Costing Issues For Successor Interconnection Agreements To The Texas 271 Agreement*, Arbitration Award of Feb. 23, 2005, SS7-Joint DPL at 1-2.

³⁰⁴ Joint Ex. 38A, Appendix Pricing-UNE, § 1.1 (“CLEC agrees to compensate SWBT for unbundled Network elements at the rates contained in this Appendix.”).

³⁰⁵ Joint Ex. 38A, UNE Appendix, § 9.1.1.

³⁰⁶ UTEX Ex. A (Telfer Dir.) at 31, ll. 3-4 (“The only proviso is that either side can opt out of the arrangement if they do not wish to obtain the service.”).

³⁰⁷ AT&T Texas Ex. 27 (Constable Reb.) at 34, l. 17 – 35, l. 2.

or that it would agree to connect in each LATA. Instead, UTEX insisted that the links would be used to exchange ISDN User Part (“ISUP”) and Transaction Capabilities (“TCAP”) messages at no charge to either party.³⁰⁸ UTEX’s failure to agree that such interconnection would be for the exchange of local traffic supports the determination that UTEX wants to use local interconnection trunks to pass large amounts of long-distance traffic for the purpose of avoiding payment of the access charges associated with that traffic.

XIX. AT&T TEXAS PROPOSES ITS ANSWERS TO DPLS.

In the briefing provided herein, AT&T Texas has provided the answers to most of the 100 DPLs at issue in this proceeding. In the Table below, AT&T Texas sets out the specific answer it proposes should be given to each DPL, referencing the pages in the briefing that support this answer. In those instances where the briefing has not specifically addressed one of these issues, AT&T Texas provides an answer with a citation to appropriate authority or evidence. For the sake of brevity, some DPLs have been grouped and some descriptions have been paraphrased.

DPL 1: Should AT&T Texas be ordered to process UTEX’s ISDN orders?	No. See Section XVII of Brief.
DPL 2: Did UTEX meet its obligations under Docket No. 29944 for ISDN Interconnection?	No. See Section XVII of Brief.
DPL 3: If not, were such obligations a condition precedent to AT&T Texas’ obligation to provide ISDN Interconnection?	Yes. See Section XVII of Brief.
DPL 4: Did AT&T Texas fail or refuse to provide UTEX with ISDN Interconnection under the parties’ ICA?	No, because UTEX never properly requested it in compliance with the ICA, as interpreted by the Commission in Docket No. 29944. See Section XVII of Brief.
DPL 5: Does ICA require AT&T Texas to provide SS7 B-Links as	No. See Section XVIII of Brief.

³⁰⁸ Constable Reb. at 35, ll. 3-7.

interconnection?	
DPL 6: Should PUC require AT&T Texas to provide SS7 B-Links as interconnection?	No. See Section XVIII of Brief.
DPL 7: Did AT&T Texas require UTEX to obtain unnecessary SS7 point codes before accepting an interconnection order?	No. Point codes are used in the SS7 environment to route messages between the various SS7 network elements in a manner similar to how the voice network uses the dialed digits to route a call. ³⁰⁹ As a result, point code information must be provided before carriers can exchange SS7 signaling. To date, UTEX has not provided any information regarding what type of point code information AT&T Texas asked for, when it asked for it, or even what type of interconnection the point code information was to be used for (e.g., ISDN, SS7 Signaling). ³¹⁰ In his rebuttal, Mr. Feldman concedes that AT&T Texas is not requiring unnecessary point code information. ³¹¹
DPL 8: Did AT&T Texas fail or refuse to provide UTEX with connections through SS7 B-Links under the ICA?	No. See Section XVIII of Brief.
DPL 9: Does the ICA require UTEX to deliver traffic to AT&T Texas' network using SS7 signaling protocol?	Yes. See Joint Ex. 38A, Attachment 11:NIA, Appendix Interconnection Trunking Requirements (ITR), § 2.1.1. See also Section XV of Brief.
DPL 10: If answer to DPL 9 is "Yes," does	Yes. The ICA places the financial burden on

³⁰⁹ AT&T Ex. 18 (Constable Dir.) at 58, ll. 5-7.

³¹⁰ *Id.* at 58, ll. 8-13.

³¹¹ UTEX Ex. H (Feldman Dir.) at 68, ll. 13-16

ICA prohibit UTEX from charging AT&T Texas for translating messages to a protocol other than SS7?	UTEX to convert its traffic to SS7. See Response to DPL 9.
DPL 11: Has AT&T Texas breached the ICA so that remedies under Attachment 17 are available to UTEX?	No. See Section XVI of Brief.
DPL 12: Alleged refusal to accept and process ISDN interconnection orders	No improper refusal occurred. UTEX did not comply with the Commission's requirements for ordering for ISDN interconnection. See Section XVII of Brief.
DPL 13: Alleged refusal to directly interconnect via SS7 B-links.	AT&T Texas has not improperly refused to provide B-Links to UTEX. The problem is that UTEX wants them for free. See Section XVIII of Brief.
DPL 14: Alleged refusal to allow UTEX to order UNEs in Midland and Lubbock and use them for interconnection.	No such refusal occurred. UTEX ordered UNEs for interconnection in Lubbock, and AT&T Texas even assisted UTEX personnel with how to properly order the UNE facilities. AT&T Texas established the UNE facilities and UTEX used them. ³¹² UTEX stated that it <i>wanted</i> to order a UNE for interconnection (as opposed to ordering an interconnection facility). ³¹³ UTEX then improperly refused to pay UNE rates for the facility, as required by

³¹² AT&T Texas Ex. 18 (Constable Dir.) at 64, ll. 23-25.

³¹³ *Id.* at 65, ll. 3-9.

	<p>§ 7 of Appendix Network Interconnection Methods.³¹⁴ UTEX did not order UNEs for Midland but instead elected to interconnection in Midland using a mid-span fiber meet. Any delays in that installation were the fault of UTEX, not AT&T Texas.³¹⁵</p>
<p>DPLs 15, 16, 17: Alleged requiring of UTEX to obtain unnecessary numbering resources, SS7 point codes, and diagrams before accepting interconnection orders.</p>	<p>UTEX has provided no specific information relating to these claims, making it impossible to address them with specificity. As a general matter, AT&T Texas routes traffic based on the dialed numbers and point codes, so, this type of information is vital to establishing interconnection orders. In addition, network diagrams for new interconnections are needed to reduce confusion and speed up the provisioning process.³¹⁶ In addition, the numbering resources that UTEX appears to object to are vital for line number portability (“LNP”) to work (and UTEX must adhere to LNP requirements per Commission order in Docket No. 29944).</p>
<p>DPL 18: Alleged refusal to provide interconnection facilities and trunks pending 911 testing</p>	<p>No such refusal has occurred. AT&T recognizes that it lost this issue in Docket No. 29944 and, since that decision, has not refused to work UTEX’s orders on the ground that UTEX has not received PSAP approval.³¹⁷</p>

³¹⁴ *Id.* at 65, ll. 12-20. *See also* NIM Appendix, §7.0 (“CLEC’s leasing of [AT&T Texas’] facilities for purposes of Attachment 11: Network Interconnection Architecture will be subject to the mutual agreement of the Parties. CLEC will have the option to lease interconnection facilities at the rates found in Appendix Pricing UNE - Schedule of Prices.”).

³¹⁵ *Id.* at 66, l. 22 – 66, l. 7.

³¹⁶ *Id.* at 66, l. 11 – 67, l. 11.

³¹⁷ *Id.* at 67, ll. 14-21.

DPL 19: Alleged failure to establish, provide or follow ordering procedures re SS7 B-links	No such failure has occurred. UTEX never submitted B-link orders to obtain AT&T Texas's tariffed B-link service. See Section XVIII of Brief.
DPLs 20 and 21: Alleged failures and refusals regarding ISDN interconnection	No improper failures or refusals have occurred. UTEX has failed to establish compliance with Commission requirements established in Docket No. 29944. See Section XVII of Brief.
DPL 22: Alleged refusal to provide dark fiber pre-ordering information in accordance with award in Docket No. 29944	No such refusal occurred. Docket No. 29944 limited UTEX to submitting dark fiber inquiry on an office-by-office basis, with no more than two offices per inquiry. UTEX has never made such a request. ³¹⁸
DPLs 23-24: Did AT&T breach its duty to "cooperatively work to correctly rate the traffic"?	No. See Sections II.G, and VII of Brief.
DPL 25: Alleged failure to provide measurements and report per Attachment 17	No such failure occurred. See Section XVI of Brief.
DPL 26: Do T2A standards and measurements apply to UTEX ICA?	No. UTEX did not opt into the T2A and is governed by the Attachment 17 to its ICA. See Section XVI of Brief.
DPL 27: Did AT&T Texas fail to self-report and provide credits or performance payments under Attachment 17?	No. AT&T Texas properly made reports available to UTEX. No payments or credits were ever owed to UTEX under Attachment 17. See Section XVI of Brief.
DPL 28: Has AT&T breached GTC §§ 9.3.1 and 36.1 by failing to act in good faith.	No. See Sections VI and VII of Brief and responses provided above to DPLs 11-24.

³¹⁸ AT&T Texas Ex. 23 (Pellerin Dir.) at 6, line 13 – 10, line 2.

DPLs 29 and 31: Are AT&T Texas' claims time barred?	No. See Section XIII of Brief.
DPL 30: Has AT&T Texas waived its claims?	No. See Section XIII of Brief.
DPL 32: Do laches, equitable estoppel and/or waiver apply to AT&T Texas' claims?	No. See Section XIII of Brief.
DPL 33: Does the doctrine of accord and satisfaction bar AT&T Texas' claims?	No. See Section XIII of Brief.
DPL 34: Does the doctrine of unclean hands bar AT&T Texas' claims?	No. See Section XIII of Brief.
DPL 35: Are there any indispensable parties?	No. See Section XII of Brief.
DPL 36: Which IXC's have routed telephone toll traffic through UTEX's interconnection facilities to avoid switched access charges?	Not all are known because AT&T Texas can identify only those involved in calls originated by AT&T Texas customers. AT&T Texas witness Jason Constable identified many of them in his rebuttal testimony. ³¹⁹
DPL 37: Are these IXC's indispensable parties?	No. See Section XII of Brief.
DPL 38: Does PUC have authority to grant the relief AT&T Texas seeks?	Yes. See Section XIV of Brief.
DPL 39: Is AT&T Texas' interpretation of the ICA unconscionable?	No. AT&T Texas' interpretation is fully supported by ICA language, surrounding circumstances, and rules of contract construction. See Sections I, II, III, and IV of Brief.
DPL 40: Does the ICA prohibit UTEX from	No. But UTEX's customers do not exempt

³¹⁹ AT&T Texas Ex. 27A (Constable Reb. Confidential) at 16, l. 21-17. l. 9.

being a wholesale provider to noncarriers?	UTEX from intraLATA access charges for no-CPN or from access charges for interLATA traffic. See Section IV of Brief and Arbitrators' Order No. 4.
DPL 41: If UTEX's customers are ESPs entitled to the ESP Exemption, does ICA allow AT&T Texas to assess access charges on UTEX?	UTEX's customers do not meet the ICA definition of an ESP. In any event, per the Arbitrators' Order No. 4, UTEX would still be liable for intraLATA access charges for failing to deliver valid CPN, regardless of status of its customers as ESPs.
DPL 42: Does ICA prohibit UTEX from providing wholesale service to "intermodel" providers?	No. But such service does not excuse UTEX from its contractual obligations to pay access charges for failure to provide CPN and for delivery of interLATA traffic.
DPL 43: Do §§ 253 and 257 bar assessment of access charges?	No. See Section V of Brief.
DPL 44: Is § 157 a bar?	No. See Section V of Brief.
DPL 45: Do PURA §§ 52.108(3), 55.003(c), 55.005 or 55.006 create a bar?	No. See Section V of Brief.
DPL 46 -- Is AT&T Texas' position consistent with WWC Award?	Yes. See Section III.A. of Brief.
DPL 47: Can PUC give ICA a "limiting construction?"	The Commission need only interpret the ICA in accordance with contract construction principles. See Sections I, II, III, and IV of Brief.
DPL 48: Did parties intend § 1.4.1 apply "without exception"?	No. Per Order No. 4, charges for failing to provide CPN for 90% of the traffic apply without regard to ESP exemption.
DPL 49: Are there exceptions to the ESP exemption?	There are circumstances where ESP exemption does not apply. See response to DPL 48.
DPL 50: What is valid or adequate CPN?	Valid or adequate CPN is a NANP 10-digit

	number that matches to the LERG and, unlike 8YY numbers, provides jurisdictional indicators. See Section II of Brief.
DPL 51: Does the ICA define CPN?	The ICA defines CPN as calling party number and the provisions in the ICA establish that this number must provide sufficient information to enable carriers to jurisdictionalize the traffic for compensation purposes. See Section II.A. of Brief.
DPL 52: Is the ICA ambiguous as to CPN?	No. There is only one reasonable interpretation of CPN, and that is the one proposed by AT&T Texas. See Section II of Brief.
DPLs 53 – 57: What about SS7 standards and Telecordia AMA releases?	They are irrelevant. See Section II.E. of Brief.
DPL 58: Can UTEX create CPN if it does not receive it from its customer?	Both parties agree that UTEX should not create CPN. The ICA expressly prohibits UTEX from altering CPN. ³²⁰
DPL 59: What CPN should be used if there is more than one originating party number?	Under the ICA, UTEX cannot alter CPN. Therefore, it must deliver the number it is given. See response to DPL 59.
DPL 60: What about email, SIP and IM screen name addresses?	Per answer to DPL 50, numbers like these are not valid or adequate CPN. See Section II of Brief.
DPL 61: What if UTEX sends CPN and AT&T fails to receive it?	This is a non-issue. See Sections II.G. and VII.
DPL 62: Does UTEX create billing failures with its CPN “policies”?	No. AT&T Texas can calculate and bill. See Section XI of Brief.
DPLs 63-64: Are 11 and 7 digit CPNs a	No. See Section II.E. of Brief.

³²⁰ Joint Ex. 38A, UNE Appendix, Section 9.2.2.3.

problem?	
DPL 65: May UTEX insert CPN information?	No. See answer to DPL 58.
DPLs 66: If so, must AT&T Texas route traffic to non-geographic numbers?	Rendered moot by negative answer to DPL 65.
DPL 67: Does the ICA require AT&T Texas to route traffic other than for meet point billing traffic?	Yes. See Section IV of Brief.
DPL 68: Does FCC support using CPN for billing?	Yes. <i>See In Re Regulation of Prepaid Calling Card Services</i> , 2006 WL 1826190, 21 FCC Rcd. 7290, ¶¶ 32-33 (June 30, 2006) (noting that “carriers that use SS7 are required to transmit the CPN associated with an interstate call to interconnecting carriers,” holding that CPN “should be used for calling card traffic” to ensure accuracy in billing, and reasoning that “[t]his approach properly balances the need for accurate intercarrier billing records with the need of some carriers to use CN for their own retail billing purposes”). See also Section II.D. of Brief.
DPL 69: Does the ICA address new technology devices that do not have NANPA phone numbers?	No. The ICA is technology neutral. See Section II of Brief
DPL 70: Is there a problem with UTEX delivering interLATA traffic over local interconnection trunks?	No. But UTEX must pay access charges for the long-distance traffic it delivers over those trunks. See Section IV of Brief.
DPL 71: Did UTEX deliver to AT&T Texas interLATA traffic over local interconnection trunks?	Yes. See Sections IV and XI of Brief..
DPL 72: Is UTEX responsible for the	Yes. See Sections IV, VIII, IX, X, and XI of

compensation for those calls?	Brief.
DPL 73: Is UTEX responsible even though these calls are routed through UTEX's customers?	Yes. UTEX's customers' involvement in the delivery of this traffic does not change the fact that these are interLATA calls. See Sections II, III, and IV of Brief.
DPLs 74 and 76: Must UTEX provide AT&T Texas with data for billing?	No. AT&T Texas has its own ability to monitor the traffic and its own data for billing. See Section IX of Brief.
DPL 75: Is UTEX responsible for interLATA access charges even though this traffic is routed over local interconnection trunks and terminated to end users who are not UTEX customers?	Yes. See Section IV of Brief.
DPL 77: What does UTEX owe AT&T Texas in interLATA access charges?	See Section XI of Brief.
DPL 78: Does "interLATA traffic" as used in the ICA refer to the same type of traffic sent or received as part of an interLATA service as defined in § 153(21) of the FTA?	Yes. The ICA is a federal interconnection agreement entered into pursuant to §§ 251 and 252 of the FTA. Nothing in the ICA would give the term "interLATA" a different meaning from that contained in the FTA.
DPL 79: Is the traffic AT&T Texas asserts is "interLATA traffic" originated by or does it terminate to a UTEX exchange service customer?	No. See Sections III.B. (noting ICA considers calling parties to be originators of calls and UTEX's customers are not the calling parties) and III.D. of Brief (explaining that calls must be evaluated according to the FCC's end-to-end analysis).
DPL 80: Does the traffic at issue "flow from or terminate to a UTEX customer that has a presence in the same LATA as the calling or called AT&T	No. See Sections III.B and III.D..

Texas customer?	
DPL 81: Can UTEX avoid responsibility for the charges arising from this traffic by asserting that it is not the subscriber's IXC or that it is jointly providing access?	No. See Section IV of Brief.
DPL 82: Is UTEX liable for interLATA charges arising from traffic to or from an ESP or ISP?	Yes. See Section IV of Brief. In addition, for the reasons set out in Section III of Brief, there is no such traffic.
DPL 83: If access charges are due, should intrastate or interstate charges apply?	Per Attachment 12: Compensation, calls originating out of state are subject to interstate charges and calls originated and terminated within the State of Texas are subject to intrastate charges.
DPL 84: What kinds of records are to be used to determine whether a call is passed "with" or "without" CPN?	AT&T Texas' terminating records are to be used. See Section IX of Brief.
DPL 85: Does ICA contemplate that AT&T Texas can base "no CPN" and "interLATA traffic" billings on terminating rather than originating records?	Yes. See Section IX of Brief.
DPL 86: If AT&T Texas can premise "no CPN" and "interLATA" billings on terminating records, what kinds of terminating records are to be used	AT&T Texas' AMA records are to be used. See Sections IX, X and XI of Brief.

under the ICA?	
DPL 87: What is the measurement period for determining whether “the percentage of calls passed with CPN is less than 90%?”	A calendar month is the measurement period for determining whether "the percentage of calls passed with CPN is less than 90%." ³²¹
DPL 88: Has AT&T Texas provided sufficient call detail to quantify any amounts that may be owed?	Yes. See Section X of Brief.
DPL 89: Should the PUC declare that ICA does not control the issue of whether UTEX may bill AT&T Texas for Signaling Layer Translation Service?	No. See Section XV of Brief.
DPL 90: Should PUC declare ICA does not operate to prevent an award and finding that AT&T Texas must pay UTEX for Signaling Layer Translation Service?	No. See Section XV of Brief.
DPL 91: Should PUC declare AT&T Texas responsible for future invoices for Signaling Layer Translation Service?	No. See Section XV of Brief.
DPL 92: Has AT&T Texas failed to negotiate in good faith during informal dispute resolution?	No. See Sections VI and VII of Brief.
DPL 93: Should AT&T Texas be ordered to interconnect with UTEX using SS7 B-Links?	No. See Section XVIII of Brief.
DPL 94: Has AT&T Texas provided timely, complete, understandable and accurate invoices?	Yes. See Section XI of Brief.

³²¹ AT&T Texas Ex. 17 (Cole Dir.) at 25:1-3.

DPL 95: Has AT&T Texas provided invoices which comply with the ICA and any applicable industry standards?	Yes. See Section XI of Brief.
DPL 96: Has AT&T Texas improperly refused to negotiate the proper routing and rating of traffic?	No. AT&T Texas has permitted UTEX to route traffic over local interconnection trunks and has properly rated traffic in accordance with the ICA. There is nothing to negotiate. See Sections II.G. and VII of Brief.
DPLs 97-100: ESP status of UTEX's customers	UTEX's customers are not ESPs within the meaning of the ICA and do not trigger the no-compensation for ESP traffic provision in § 1.4.1 of Attachment 12. See Section III of Brief.

CONCLUSION AND REQUEST FOR RELIEF

AT&T Texas requests that the Commission resolve the disputed issues in favor of AT&T Texas, affirm AT&T Texas' interpretation of the parties' ICA, order UTEX to pay AT&T Texas all applicable access charges in the amounts set out herein for traffic transmitted to AT&T Texas' network without CPN from December 2004 to September 2007, order UTEX to pay AT&T Texas the amounts set out herein for interLATA traffic terminated to AT&T Texas to September 2007, and grant AT&T Texas such other relief to which it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew M. Jones, Senior Attorney for AT&T Texas, certify that a true and correct copy of this document was served to all parties hereto on the 21st day of December, 2007, in the following manner, via: U.S. Mail, electronic mail, facsimile, or overnight delivery.

